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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91218363
Party	Plaintiff NEW WAVE INNOVATIONS, INC.
Correspondence Address	JOHN H FARO FARO & ASSOCIATES 1395 BRICKELL AVENUE SUITE 800 MIAMI, FL 33131 UNITED STATES JOHNF75712@AOL.COM
Submission	Other Motions/Papers
Filer's Name	John Faro
Filer's e-mail	Johnf75712@aol.com
Signature	/John Faro/
Date	04/27/2015
Attachments	SuppComplyRequestInfoReduced.pdf(217739 bytes) Exh1DocketSheetReduced.pdf(218952 bytes) Exh2DE#111OrderRedcued.pdf(102217 bytes) Exh3NWIAppealBriiefRedcued.pdf(99615 bytes) Exh4DE#206OrderStayReduced.pdf(107370 bytes) Exh511thCirDecisionReduced.pdf(27503 bytes)

IN THE UNITED STATES PATENT & TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL & APPEAL BOARD

NEW WAVE INNOVATIONS, INC.
(A California Corporation)

OPPOSER

vs.

MR. FOAMER, INC.
(A Florida Corporation)

APPLICANT

In Re: Opposition NO. 91/218,363

**OPPOSER COMPLIANCE WITH TTAB REQUEST
TO SUPPLEMENT RECORD WITH DOCUMENTS & INFORMATION**

On April 3, 2015, the TTAB rendered a Decision on the Applicant's *Motion To Dismiss*, wherein it held that the New Wave Innovations, Inc. (NWI) Opposition was sufficiently pled, and thereupon denied the Mr. Foamer, Inc. (Foamer) Motion to Dismiss. In its Order denying the Applicant Motion to Dismiss, the TTAB requested that NWI supplement the record (Order @ page 8).

The following information/documents are herein submitted to supplement the Record in this Opposition.

1. On July 16, 2013, NWI sued Applicant, in the Federal District Court for the Southern District of Florida, for Unfair Competition, under Federal Law, and for Theft of Trade Secrets and Trademark Infringement under State Law – Copy of Docket Sheet in Federal District Court annexed hereto as **Exhibit “1”**;
2. On March 28, 2014, the District Court entered an Order [DE #111], (based upon a Magistrate Report & Recommendation, which found insufficient evidence (at the hearing conducted on October 29, 2013) to establish “continuous use” of the NWI

- mascot named MR FOAMER – **Character/Design Trademark**), which had denied the NWI Motion for Preliminary Injunction, Court Order [DE #111], annexed hereto as **Exhibit “2”**;
3. NWI appealed the District Court Order to the 11th Circuit Court of Appeals, NWI Appeal Brief annexed hereto as **Exhibit “3”**;
 4. On September 30, 2014, the District Court litigation by *NWI vs Applicant* was stayed pending resolution of the trademark issues in the 11th Circuit Court of Appeals AND the instant Opposition before the TTAB; Court Order [DE #206] annexed hereto as **Exhibit “4”**;
 5. The District Court litigation between NWI and the Applicant continues to be stayed;
 6. On January 25, 2015, the 11th Circuit Court of Appeals affirmed the District Court Order denying the NWI Motion for Preliminary Injunction, to enjoin the Opposer’s use of the MR FOAMER mark, based upon the limited use of the MR FOAMER **Character/Design Trademark**, (District Court; 11th Circuit decision annexed hereto as **Exhibit “5”**;
 7. NWI has abandoned trademark prosecution of its application to register the MR FOAMER, **Character/Design Trademark**, (*NWI Trademark Appln Ser. No. 86303800*)
 8. The NWI trademark application (*NWI Trademark Appln Ser. No. 86304665*), for registration of the MR FOAMER (**Word Mark**) before the United States Patent & Trademark Office, has been reviewed on the record before the Trademark Examiner, and NWI determined to be entitled to registration, based upon the adoption and continuous use of the MR FOAMER (Word Mark), in interstate commerce, for *on-line* solicitation and sales of commercial car wash products;

9. The *ex parte* proceedings involving the NWI trademark application (*Ser. No. 86304665*) to register the MR FOAMER (**Word Mark**) before the United States Trademark Office, has been suspended, pending resolution of this Opposition before the TTAB.

It is respectfully submitted that the foregoing information and documents comply with the Order by the TTAB entered in this Opposition on April 3, 2015. If additional information, and/or documents, are needed or desired to further supplement the Record, please advise.

Respectfully,

/John H. Faro/
Reg. No. 25,859
Attorney for NWI/Opposer

CERTIFICATE OF SERVICE

I hereby certify that the enclosed pleading entitled:

**OPPOSER COMPLIANCE WITH TTAB REQUEST
TO SUPPLEMENT RECORD WITH DOCUMENTS & INFORMATION**

has been served upon Applicant's Counsel, *via email*, this 27th day of April 2015.

Respectfully,

/John H. Faro/
Reg. No. 25,859

CLOSED,EGT,MEDREQ,STAYED

**U.S. District Court
Southern District of Florida (Miami)
CIVIL DOCKET FOR CASE #: 1:13-cv-22541-MGC**

New Wave Innovations, Inc. v. McClimond et al
Assigned to: Judge Marcia G. Cooke
Referred to: Magistrate Judge Edwin G. Torres
Case in other court: USCA, 14-11466-C
Cause: 15:1125 Trademark Infringement (Lanham Act)

Date Filed: 07/16/2013
Date Terminated: 09/30/2014
Jury Demand: None
Nature of Suit: 840 Trademark
Jurisdiction: Federal Question

Plaintiff**New Wave Innovations, Inc.**

represented by **John H. Faro**
Faro & Associates
P.O. Box 490014
Key Biscayne, FL 33149
305-761-6921
Fax: 305-726-0029
Email: JohnF75712@aol.com
ATTORNEY TO BE NOTICED

V.

Defendant**James McClimond**
an individual

represented by **Adam Douglas Palmer**
Schoeppl & Burke
4651 N Federal Highway
Boca Raton, FL 33431-5133
561-394-5602
Fax: 394-3121
Email: apalmer@schoepplburke.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Albert Benedict Maggio , Jr.
CRGO Law
7900 Glades Road
Suite 520
Boca Raton, FL 33434
561-922-3836
Fax: (561) 244-1062
Email: amaggio@crgolaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Isabelle Jung
CRGO Law
7900 Glades Road
Suite 520
Boca Raton, FL 33434-4105
561-922-3845
Email: ijung@crgolaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Steven Mark Greenberg
CRGO Law
7900 Glades Road
Suite 520
Boca Raton, FL 33434
561 922-3837
Fax: 561-244-1062
Email: sgreenberg@crgolaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Meredith Chaiken-Weiss
CRGO Law
7900 Glades Road
Suite 520
Boca Raton, FL 33434
561-922-3845
Email: mchaiken@crgolaw.com
ATTORNEY TO BE NOTICED

Defendant

Mr. Foamer, Inc.
a Florida corporation

represented by **Adam Douglas Palmer**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Albert Benedict Maggio , Jr.
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Isabelle Jung
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Steven Mark Greenberg
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Meredith Chaiken-Weiss
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Car Wash Experts, Inc.
a Florida corporation

represented by **Adam Douglas Palmer**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Albert Benedict Maggio , Jr.
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Isabelle Jung
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Steven Mark Greenberg
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Meredith Chaiken-Weiss
(See above for address)
ATTORNEY TO BE NOTICED

Counter Claimant

Mr. Foamer, Inc.
a Florida corporation

represented by **Adam Douglas Palmer**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Albert Benedict Maggio , Jr.
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Isabelle Jung
(See above for address)

LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Steven Mark Greenberg
 (See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Meredith Chaiken-Weiss
 (See above for address)
ATTORNEY TO BE NOTICED

V.

Counter Defendant

New Wave Innovations, Inc.

represented by **John H. Faro**
 (See above for address)
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
07/16/2013	<u>1</u>	COMPLAINT <i>Against James McClimond by New Wave Innovations, Inc.</i> against New Wave Innovations, Inc.. Filing fees \$ 400.00 receipt number 113C-5890890, filed by New Wave Innovations, Inc..(Faro, John) (Entered: 07/16/2013)
07/16/2013	2	Judge Assignment to Judge Marcia G. Cooke (ail) (Entered: 07/16/2013)
07/16/2013	<u>3</u>	Summons Issued as to Car Wash Experts, Inc., James McClimond, Mr, Foamer, Inc.. (ail) (Entered: 07/16/2013)
07/16/2013	<u>4</u>	FORM AO 120 SENT TO DIRECTOR OF U.S. PATENT AND TRADEMARK (ail) (Entered: 07/16/2013)
07/16/2013	<u>5</u>	EXHIBITS <i>to New Wave Innovations Complaint</i> by New Wave Innovations, Inc. re: <u>1</u> Complaint filed by New Wave Innovations, Inc.. Related document: <u>1</u> Complaint filed by New Wave Innovations, Inc..(Faro, John) (Entered: 07/16/2013)
07/17/2013	6	Clerks Notice to Filer re <u>5</u> Exhibits. Document Not Captioned; CORRECTIVE ACTION REQUIRED - The Filer must File a Notice of Striking, then refile the document with the proper caption pursuant to Local Rules. (jua) (Entered: 07/17/2013)
07/17/2013	<u>7</u>	Notice of Filing Exhibits to <u>1</u> Complaint by New Wave Innovations, Inc. (Faro, John) Modified text on 7/18/2013 (jua). (Entered: 07/17/2013)
07/17/2013	<u>8</u>	NOTICE by New Wave Innovations, Inc. re <u>1</u> Complaint - <i>Notice of Filing of Exhibits to Complaint</i> (Faro, John) (Entered: 07/17/2013)
07/22/2013	<u>9</u>	ORDER REFERRING CASE to Magistrate Judge William C. Turnoff for Pretrial Proceedings. Signed by Judge Marcia G. Cooke on 7/22/2013. (tm) (Entered: 07/22/2013)

07/22/2013	10	Order Requiring Joint Scheduling Report. Signed by Judge Marcia G. Cooke on 7/22/2013. (tm) (Entered: 07/22/2013)
07/22/2013	11	ORDER EXPEDITING SERVICE. Signed by Judge Marcia G. Cooke on 7/22/2013. (tm) (Entered: 07/22/2013)
08/05/2013	12	NOTICE by New Wave Innovations, Inc. <i>Of Defendant Engagement of Counsel In This Matter</i> (Faro, John) (Entered: 08/05/2013)
08/05/2013	13	NOTICE by New Wave Innovations, Inc. <i>Filing of Amended Complaint (First)</i> (Attachments: # 1 Exhibit Amended Complaint (First))(Faro, John) (Entered: 08/05/2013)
08/05/2013	14	NOTICE by New Wave Innovations, Inc. re 13 Notice (Other) <i>Of Filing Exhibits to Amended Complaint1</i> (Attachments: # 1 Exhibit Exhibits to Amended Complaint1) (Faro, John) (Entered: 08/05/2013)
08/05/2013	15	FIRST AMENDED COMPLAINT against Car Wash Experts, Inc., James McClimond, Mr. Foamer, Inc., filed by New Wave Innovations, Inc. (See DE 13 for image)(jua) (Entered: 08/06/2013)
08/06/2013	16	Clerks Notice to Filer re 13 Notice (Other). ERROR - The Filer selected the wrong event. The document was re-docketed by the Clerk, see [de#15]. It is not necessary to refile this document. (jua) (Entered: 08/06/2013)
08/20/2013	17	EMERGENCY MOTION for Preliminary Injunction <i>For Trademark & Trade Dress Infringement</i> and Incorporated Memorandum of Law by New Wave Innovations, Inc.. (Attachments: # 1 Affidavit Ross Declaration In Support of Emergency Motiion For Preliminary Injunction)(Faro, John) Modified text on 8/21/2013 (jua). (Entered: 08/20/2013)
08/20/2013	18	NOTICE of Filing of Exhibits 1-2 Referenced in Ross Declaration in Support by New Wave Innovations, Inc. re 17 MOTION for Preliminary Injunction <i>For Trademark & Trade Dress Infringement</i> (Attachments: # 1 Exhibit Exhibits 1-2 to Ross Declaration) (Faro, John) Modified text on 8/21/2013 (jua). (Entered: 08/20/2013)
08/20/2013	19	NOTICE of Filing of Exhibits 3-6 Referenced in Ross Declaration in Support by New Wave Innovations, Inc. re 17 MOTION for Preliminary Injunction <i>For Trademark & Trade Dress Infringement</i> (Attachments: # 1 Exhibit Exhibits 3-6 to Ross Declaration) (Faro, John) Modified text on 8/21/2013 (jua). (Entered: 08/20/2013)
08/20/2013	20	NOTICE of Filing of Signature Copy of Ross Declaration in Support by New Wave Innovations, Inc. re 17 MOTION for Preliminary Injunction <i>For Trademark & Trade Dress Infringement</i> (Attachments: # 1 Affidavit Signature Copy Of Ross Declaration) (Faro, John) Modified text on 8/21/2013 (jua). (Entered: 08/20/2013)
08/21/2013	21	Clerks Notice to Filer re 17 MOTION for Preliminary Injunction <i>For Trademark & Trade Dress Infringement</i> . Emergency Document Filed Electronically ; ERROR - Emergency matters may not be filed electronically, they must be filed in the conventional paper format in the division where the judge is chambered. The Clerk contacted Chambers and corrected the docket text to indicate the document is an emergency matter. It is not necessary to refile this document but future filings must

		comply with the CM/ECF Administrative Procedures and Local Rules. (jua) (Entered: 08/21/2013)
08/23/2013	22	Defendant's MOTION for More Definite Statement , First MOTION to Strike 13 Notice (Other), 14 Notice (Other) (Responses due by 9/9/2013) by Car Wash Experts, Inc., James McClimond, Mr. Foamer, Inc.. Attorney Albert Benedict Maggio, Jr added to party Car Wash Experts, Inc.(pty:dft), Attorney Albert Benedict Maggio, Jr added to party James McClimond(pty:dft), Attorney Albert Benedict Maggio, Jr added to party Mr. Foamer, Inc.(pty:dft). (Attachments: # 1 Exhibit Exhibit A, # 2 Exhibit Exhibit B, # 3 Exhibit Exhibit C, # 4 Exhibit Exhibit D, # 5 Exhibit Exhibit E)(Maggio, Albert) (Entered: 08/23/2013)
08/26/2013	23	Clerks Notice to Filer re 22 Defendant's MOTION for More Definite Statement First MOTION to Strike 13 Notice (Other), 14 Notice (Other) . Attorney Did Not Associate Themselves ; ERROR - Filing attorney neglected to associate themselves to the case. The Clerk has added the attorney to the case. It is not necessary to refile this document future filings must comply with the CM/ECF Administrative Procedures and Local Rules by filing a Notice of Attorney Appearance and linking themselves to the case. (jua) (Entered: 08/26/2013)
08/27/2013	24	First MOTION for 15 DAY EXTENSION OF TIME TO FILE OPPOSITION TO DE 22 by New Wave Innovations, Inc.. Responses due by 9/13/2013 (Faro, John) Modified text on 8/28/2013 (jua). (Entered: 08/27/2013)
08/28/2013	25	ORDER Striking Emergency Designation re 17 MOTION for Preliminary Injunction <i>For Trademark & Trade Dress Infringement</i> filed by New Wave Innovations, Inc. ORDER REFERRING MOTION: 17 MOTION for Preliminary Injunction <i>For Trademark & Trade Dress Infringement</i> filed by New Wave Innovations, Inc. is referred to the Honorable William C. Turnoff, in accordance with 28 U.S.C. §§ 636(b) (1)(A) and (B). Signed by Judge Marcia G. Cooke on 8/28/2013. (eah) (Entered: 08/28/2013)
08/28/2013	26	ORDER REFERRING MOTION: 22 Defendant's MOTION for More Definite Statement filed by Car Wash Experts, Inc., Mr. Foamer, Inc., James McClimond is referred to the Honorable William C. Turnoff, under 28 U.S.C. § 636(b)(1)(A). Signed by Judge Marcia G. Cooke on 8/28/2013. (eah) (Entered: 08/28/2013)
08/29/2013	27	RESPONSE in Opposition re 24 First MOTION for Extension of Time 15 DAY EXTENSION OF TIME TO FILE OPPOSITION TO DE 22 filed by Car Wash Experts, Inc., James McClimond, Mr. Foamer, Inc.. (Attachments: # 1 Affidavit Exhibit A, # 2 Exhibit Exhibit B)(Maggio, Albert) Modified text on 8/29/2013 (jua). (Entered: 08/29/2013)
08/29/2013	28	PAPERLESS ORDER granting in part and denying in part 24 Plaintiff's Motion for Extension of Time. Plaintiff's Response is due by 9/18/2013. This entry constitutes the Paperless Order in its entirety. Signed by Magistrate Judge William C. Turnoff on 8/29/2013. (mao) (Entered: 08/29/2013)
08/29/2013	29	PAPERLESS ORDER Setting Status Conference re: pending matters. Status Conference Re: pending matters set for 9/17/2013 02:00 PM in Miami Division before Magistrate Judge William C. Turnoff. Signed by Magistrate Judge William C. Turnoff

		on 8/29/2013. (mao) (Entered: 08/29/2013)
09/03/2013	30	NOTICE of Filing <i>Proposed Order Granting Defendants' First Combined Motion to Strike and Motion for a More Definite Statement</i> by Car Wash Experts, Inc., Mr. Foamer, Inc., James McClimond re 22 Defendant's MOTION for More Definite Statement First MOTION to Strike 13 Notice (Other), 14 Notice (Other) (Attachments: # 1 Text of Proposed Order)(Maggio, Albert) Modified text on 9/4/2013 (jua). (Entered: 09/03/2013)
09/05/2013	31	Defendant's MOTION for Extension of Time to File Response/Reply as to 17 MOTION for Preliminary Injunction <i>For Trademark & Trade Dress Infringement</i> by Car Wash Experts, Inc., James McClimond, Mr. Foamer, Inc.. (Attachments: # 1 Exhibit Exhibit A)(Maggio, Albert) (Entered: 09/05/2013)
09/06/2013	32	PAPERLESS ORDER granting 31 Motion for Extension of Time to File Response/Reply as to 17 MOTION for Preliminary Injunction <i>For Trademark & Trade Dress Infringement</i> . Responses due by 9/9/2013. Signed by Magistrate Judge William C. Turnoff on 9/6/2013. (lw1) (Entered: 09/06/2013)
09/09/2013	33	MEMORANDUM of Law in Opposition re 17 MOTION for Preliminary Injunction <i>For Trademark & Trade Dress Infringement</i> , 31 Defendant's MOTION for Extension of Time to File Response/Reply as to 17 MOTION for Preliminary Injunction <i>For Trademark & Trade Dress Infringement</i> filed by Car Wash Experts, Inc., James McClimond, Mr. Foamer, Inc.. (Attachments: # 1 Exhibit Affidavit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit, # 6 Exhibit)(Maggio, Albert) Modified text on 9/10/2013 (jua). (Entered: 09/09/2013)
09/09/2013	34	NOTICE by Car Wash Experts, Inc., Mr. Foamer, Inc., James McClimond re 33 Response in Opposition to Motion,, <i>of Filing Affidavit of James McClimond</i> (Maggio, Albert) (Entered: 09/09/2013)
09/15/2013	35	RESPONSE in Opposition re 22 Defendant's MOTION for More Definite Statement First MOTION to Strike 13 Notice (Other), 14 Notice (Other) filed by New Wave Innovations, Inc.. (Faro, John) (Entered: 09/15/2013)
09/15/2013	36	NOTICE by New Wave Innovations, Inc. re 35 Response in Opposition to Motion <i>re Filing Exhibit to Opposition</i> (Faro, John) (Entered: 09/15/2013)
09/17/2013	37	Minute Entry for proceedings held before Magistrate Judge William C. Turnoff: Status Conference held on 9/17/2013, Motion Hearing held on 9/17/2013 re 22 Defendant's MOTION for More Definite Statement First MOTION to Strike 13 Notice (Other), 14 Notice (Other) filed by Car Wash Experts, Inc., Mr. Foamer, Inc., James McClimond. *Motion addressed. Oral arguments heard. Order to follow, consistent with instructions stated in open court. Court shall set hearing regarding Motion for Preliminary Injunction DE#17. **APPEARANCES: John H. Faro, Esq. present on behalf of the Plaintiff. Albert B. Maggio, Jr., Esq. present and Isabelle Jung, Esq. present (pro hac) on behalf of the Defendants. (Time: 2:00PM-2:42PM) (Digital 14:17:06.) (lw1) (Entered: 09/17/2013)
09/17/2013	39	MOTION to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing for Isabelle Jung. Filing Fee \$

		75.00. Receipt # 65671. (ksa) (Entered: 09/23/2013)
09/18/2013	38	ORDER denying as moot 22 Motion for More Definite Statement; denying 22 Motion to Strike 22 Defendant's MOTION for More Definite Statement First MOTION to Strike 13 Notice (Other), 14 Notice (Other) . Signed by Magistrate Judge William C. Turnoff on 9/18/2013. (mao) (Entered: 09/18/2013)
09/25/2013	40	Notice of Hearing re 17 MOTION for Preliminary Injunction <i>For Trademark & Trade Dress Infringement</i> filed by New Wave Innovations, Inc. (Motion Hearing set for 10/29/2013 10:00 AM in Miami Division before Magistrate Judge William C. Turnoff.) Signed by Magistrate Judge William C. Turnoff on 9/24/2013. (cbr) (Entered: 09/25/2013)
09/25/2013	41	ORDER granting 39 Motion to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing. Signed by Magistrate Judge William C. Turnoff on 9/24/2013. (jua) (Entered: 09/25/2013)
09/27/2013	42	NOTICE of Attorney Appearance by Adam Douglas Palmer on behalf of Car Wash Experts, Inc., James McClimond, Mr. Foamer, Inc.. Attorney Adam Douglas Palmer added to party Car Wash Experts, Inc.(pty:dft), Attorney Adam Douglas Palmer added to party James McClimond(pty:dft), Attorney Adam Douglas Palmer added to party Mr. Foamer, Inc.(pty:dft). (Palmer, Adam) (Entered: 09/27/2013)
09/27/2013	43	ANSWER and Affirmative Defenses to Amended Complaint by Car Wash Experts, Inc., James McClimond, Mr. Foamer, Inc.. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G)(Maggio, Albert) (Entered: 09/27/2013)
10/08/2013	44	MOTION to Seek Unilateral Filing of Scheduling Report by Car Wash Experts, Inc., James McClimond, Mr. Foamer, Inc. (Attachments: # 1 Text of Proposed Order) (Greenberg, Steven) Modified text on 10/9/2013 (jua). (Entered: 10/08/2013)
10/09/2013	45	RESPONSE in Opposition re 44 MOTION for Leave to File <i>Scheduling Report Unilaterally</i> filed by New Wave Innovations, Inc.. (Faro, John) (Entered: 10/09/2013)
10/09/2013	46	ENDORSED ORDER denying <i>without prejudice</i> 44 Defendants' Motion to Seek Unilateral Filing of Scheduling Report. The parties are hereby ORDERED to meet and confer - in person - and file a Joint Scheduling Report on or before October 18, 2013. Failure to do so may result in sanctions, including dismissal of this action, pursuant to S.D. Fla. L. R. 16.1(l). Signed by Judge Marcia G. Cooke on 10/9/2013. (eah) (Entered: 10/09/2013)
10/17/2013	47	SCHEDULING REPORT - Rule 16.1 by New Wave Innovations, Inc. (Faro, John) (Entered: 10/17/2013)
10/21/2013	48	NOTICE by New Wave Innovations, Inc. re 17 MOTION for Preliminary Injunction <i>For Trademark & Trade Dress Infringement of Filing Declaration of Courtney Chenowetch</i> (Faro, John) Modified Text on 10/22/2013 (ls). (Entered: 10/21/2013)
10/21/2013	49	NOTICE by New Wave Innovations, Inc. re 17 MOTION for Preliminary Injunction <i>For Trademark & Trade Dress Infringement Declaration of Timothy S. Reilly in Support of Motion for Preliminary Injunction</i> (Faro, John) (Entered: 10/21/2013)

10/21/2013	50	AFFIDAVIT in Opposition re 17 MOTION for Preliminary Injunction <i>For Trademark & Trade Dress Infringement</i> filed by Car Wash Experts, Inc., James McClimond, Mr. Foamer, Inc.. (Attachments: # 1 Affidavit)(Greenberg, Steven) (Entered: 10/21/2013)
10/21/2013	51	NOTICE by New Wave Innovations, Inc. re 17 MOTION for Preliminary Injunction <i>For Trademark & Trade Dress Infringement Amended Declaration of Michael Ross in Support of Plaintiff Motion For Preliminary Injunction</i> (Faro, John) (Entered: 10/21/2013)
10/21/2013	52	NOTICE by New Wave Innovations, Inc. <i>Notice of Filing Exhibits 3-5 to Ross Declarartion in Support of Motion for Preliminary Injunction</i> (Faro, John) (Entered: 10/21/2013)
10/21/2013	53	NOTICE by New Wave Innovations, Inc. re 51 Notice (Other) <i>Notice of Filing Exhibits 6-7 to Ross Declaration in Support of Motion for Preliminary Injunction</i> (Faro, John) (Entered: 10/21/2013)
10/21/2013	54	NOTICE by New Wave Innovations, Inc. re 51 Notice (Other) <i>Notice of Filing Exhibits 1 & 2 to Amended Declaration of Michael Ross in Support of Motion for Preliminary Injunction</i> (Faro, John) (Entered: 10/21/2013)
10/23/2013	55	SUPPLEMENTAL MEMORANDUM of Law in Opposition re 17 MOTION for Preliminary Injunction <i>For Trademark & Trade Dress Infringement Supplemental Memorandum of Law</i> filed by Car Wash Experts, Inc., James McClimond, Mr. Foamer, Inc.. (Attachments: # 1 Exhibit Exhibit 1, # 2 Exhibit Exhibit 2, # 3 Exhibit Exhibit 3)(Greenberg, Steven) Modified text on 10/24/2013 (jua). (Entered: 10/23/2013)
10/27/2013	56	NOTICE of Filing Discovery: Initial Disclosure - Amended by New Wave Innovations, Inc..(Faro, John) (Entered: 10/27/2013)
10/28/2013	57	Proposed Findings of Fact and Proposed Conclusions of Law <i>for on Motion for Preliminary Injuncton</i> by New Wave Innovations, Inc.. (Faro, John) (Entered: 10/28/2013)
10/29/2013	58	Clerks Notice to Filer re 57 Proposed Findings of Fact. Proposed Order Docketed as Main Document ; CORRECTIVE ACTION REQUIRED - Filer must File a Notice of Striking, then resubmit the proposed order as instructed in the CM/ECF Administrative Procedures (jua) (Entered: 10/29/2013)
10/29/2013	59	Minute Entry for proceedings held before Magistrate Judge William C. Turnoff: Evidentiary Hearing held on 10/29/2013 re 17 MOTION for Preliminary Injunction <i>For Trademark & Trade Dress Infringement</i> filed by New Wave Innovations, Inc.. Matter taken under advisement (Please see court minutes for further details). Court Reporter: Lisa Edwards, 305-523-5499 / Lisa_Edwards@flsd.uscourts.gov (lw1) (Entered: 10/30/2013)
10/29/2013	60	Exhibit and Witness List from Evidentiary Hearing held 10/29/13 before Magistrate Judge William C. Turnoff. (Attachments: # 1 Exhibits Not Scanned)(lw1) (Entered: 10/30/2013)
11/12/2013	61	TRANSCRIPT of Motion for Preliminary Injunction for Trademark and Trade Dress Infringement held on October 29, 2013, before Magistrate Judge William C. Turnoff,

		1-286 pages, Court Reporter: Lisa Edwards, 305-523-5499 / Lisa_Edwards@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 12/6/2013. Redacted Transcript Deadline set for 12/16/2013. Release of Transcript Restriction set for 2/13/2014. (le) (Entered: 11/12/2013)
11/18/2013	62	SCHEDULING ORDER: Jury Trial set for 9/8/2014 at 09:30 AM in Miami Division before Judge Marcia G. Cooke. Calendar Call set for 9/3/2014 at 03:00 PM in Miami Division before Judge Marcia G. Cooke. Amended Pleadings due by 12/27/2013. Expert Discovery due by 5/9/2014. Fact Discovery due by 3/28/2014. Joinder of Parties due by 12/27/2013. Motions In Limine due by 8/1/2014. Dispositive Motions due by 4/4/2014. <i>Daubert</i> Motions due by 5/16/2014. Pretrial Stipulation due by 8/1/2014. ORDER REFERRING CASE to Mediation. Mediation Deadline 5/23/2014. Signed by Judge Marcia G. Cooke on 11/18/2013. (eah) (Entered: 11/18/2013)
11/22/2013	63	NOTICE to Take Deposition of Car Wash Experts, Inc by New Wave Innovations, Inc..(Faro, John) (Entered: 11/22/2013)
11/22/2013	64	NOTICE to Take Deposition of Mr. Foamer, Inc by New Wave Innovations, Inc..(Faro, John) (Entered: 11/22/2013)
11/22/2013	65	NOTICE to Take Deposition of James "Jim" McClimond by New Wave Innovations, Inc..(Faro, John) (Entered: 11/22/2013)
12/25/2013	66	MOTION to Amend/Correct <i>Complaint</i> by New Wave Innovations, Inc.. Responses due by 1/13/2014 (Faro, John) (Entered: 12/25/2013)
12/25/2013	67	NOTICE by New Wave Innovations, Inc. re 66 MOTION to Amend/Correct <i>Complaint Notice of Filing of Exhibits to Proposed Amended Complaint</i> (Attachments: # 1 Exhibit No. 1, # 2 Exhibit No. 2, # 3 Exhibit No. 3, # 4 Exhibit No. 4, # 5 Exhibit No. 5, # 6 Exhibit No. 6)(Faro, John) (Entered: 12/25/2013)
01/09/2014	68	RESPONSE in Opposition re 66 MOTION to Amend/Correct <i>Complaint</i> filed by Car Wash Experts, Inc., James McClimond, Mr. Foamer, Inc.. (Attachments: # 1 Exhibit) (Greenberg, Steven) (Entered: 01/09/2014)
01/16/2014	69	RE-NOTICE by New Wave Innovations, Inc. of Rule 30(B)(6)Deposition of Defendant, Car Wash Experts, Inc. <i>Duces Tecum</i> (Faro, John) Modified text on 1/17/2014 (jua). (Entered: 01/16/2014)
01/16/2014	70	RE-NOTICE by New Wave Innovations, Inc. of Rule 30(B)(6)Deposition of Defendant, Mr. Foamer, Inc. <i>Duces Tecum</i> (Faro, John) Modified text on 1/17/2014 (jua). (Entered: 01/16/2014)
01/16/2014	71	RE-NOTICE by New Wave Innovations, Inc. of Rule 30(B)(6)Deposition of Defendant, McClimond <i>Duces Tecum</i> (Faro, John) Modified text on 1/17/2014 (jua). (Entered: 01/16/2014)
01/20/2014	72	REPLY to Defendant Opposition re 66 MOTION to Amend/Correct <i>Complaint</i> filed by New Wave Innovations, Inc. (Faro, John) Modified text on 1/21/2014 (jua).

		(Entered: 01/20/2014)
01/21/2014	73	NOTICE of Change of Address by Steven Mark Greenberg (Greenberg, Steven) (Entered: 01/21/2014)
01/21/2014	74	NOTICE of Change of Address by Steven Mark Greenberg (Greenberg, Steven) (Entered: 01/21/2014)
01/21/2014	75	NOTICE of Change of Address by Steven Mark Greenberg (Greenberg, Steven) (Entered: 01/21/2014)
01/24/2014	76	REPORT AND RECOMMENDATIONS re 17 MOTION for Preliminary Injunction <i>For Trademark & Trade Dress Infringement</i> filed by New Wave Innovations, Inc. See R&R for details. Objections to R&R due by 2/10/2014 Signed by Magistrate Judge William C. Turnoff on 1/24/2014. (mao) (Entered: 01/24/2014)
01/24/2014	77	REPORT AND RECOMMENDATIONS re 17 MOTION for Preliminary Injunction <i>For Trademark & Trade Dress Infringement</i> filed by New Wave Innovations, Inc. Objections to R&R due by 2/10/2014 Signed by Magistrate Judge William C. Turnoff on 1/24/2014. (mao) (Entered: 01/24/2014)
01/24/2014	78	First MOTION to Compel <i>Discovery</i> by Car Wash Experts, Inc., James McClimond, Mr. Foamer, Inc.. Responses due by 2/10/2014 (Greenberg, Steven) (Entered: 01/24/2014)
01/26/2014	79	MOTION for Sanctions <i>under Rule 11 Related to Plaintiff's Motion for a Preliminary Injunction (D.E. 17)</i> by Car Wash Experts, Inc., James McClimond, Mr. Foamer, Inc.. (Greenberg, Steven) (Entered: 01/26/2014)
01/29/2014	80	NOTICE by New Wave Innovations, Inc. <i>Stipulated Protective Order For Endorsement By Court</i> (Attachments: # 1 Text of Proposed Order Protective Order) (Faro, John) (Entered: 01/29/2014)
01/30/2014	81	STIPULATED PROTECTIVE ORDER. Signed by Magistrate Judge William C. Turnoff on 1/30/2014. (lw1) (Entered: 01/31/2014)
02/10/2014	82	OBJECTIONS to 76 , 77 Report and Recommendations <i>As To Ownership Of "Mr. Foamer mark in design</i> by New Wave Innovations, Inc.. (Faro, John) (Entered: 02/10/2014)
02/10/2014	83	NOTICE by New Wave Innovations, Inc. <i>Of Filing New Wave Objection Magistrate R&R In Further Support of Motion to Amend</i> (Faro, John) (Entered: 02/10/2014)
02/13/2014	84	*Endorsed Order requiring a written response by Plaintiffs to Defendants' Motion to Compel 78 by 5:00 p.m. on Tuesday, February 18, 2014. This entry constitutes the Endorsed Order in its entirety. Signed by Magistrate Judge William C. Turnoff on 2/13/2014. (mao) (Entered: 02/13/2014)
02/13/2014		Set Deadlines per 84 Order as to 78 First MOTION to Compel <i>Discovery</i> . Responses due by 2/18/2014 (asl) (Entered: 02/13/2014)
02/13/2014	85	MOTION for Hearing <i>On New Wave Objection To Magistrate R&R</i> re 82 Objections to Report and Recommendation by New Wave Innovations, Inc.. (Faro, John) Modified to

		add link on 2/13/2014 (jua). (Entered: 02/13/2014)
02/13/2014	86	Clerks Notice to Filer re 85 MOTION for Hearing <i>On New Wave Objection To Magistrate R&R</i> . Document Not Linked ; ERROR - The filed document was not linked to the related docket entry. The correction was made by the Clerk. It is not necessary to refile this document. (jua) (Entered: 02/13/2014)
02/13/2014	87	OPPOSITION TO OBJECTION to 77 Report and Recommendations by Car Wash Experts, Inc., James McClimond, Mr. Foamer, Inc.. (Greenberg, Steven) Modified text on 2/14/2014 (jua). (Entered: 02/13/2014)
02/14/2014	88	RESPONSE to Motion re 85 MOTION for Hearing <i>On New Wave Objection To Magistrate R&R</i> filed by Car Wash Experts, Inc., James McClimond, Mr. Foamer, Inc.. Replies due by 2/24/2014. (Greenberg, Steven) (Entered: 02/14/2014)
02/17/2014	89	RESPONSE to Motion re 78 First MOTION to Compel <i>Discovery</i> filed by New Wave Innovations, Inc.. Replies due by 2/27/2014. (Faro, John) (Entered: 02/17/2014)
02/17/2014	90	NOTICE of Filing of Exhibits Nos. 4-8 to 89 Response to Motion re 78 First MOTION to Compel <i>Discovery</i> filed by New Wave Innovations, Inc. (Faro, John) Modified text on 2/18/2014 (jua). (Entered: 02/17/2014)
02/27/2014	91	SECOND MOTION to Compel <i>response to requests for production of documents</i> by Car Wash Experts, Inc., James McClimond, Mr. Foamer, Inc.. Responses due by 3/17/2014 (Greenberg, Steven) Modified text on 2/28/2014 (jua). (Entered: 02/27/2014)
02/27/2014	92	PAPERLESS ORDER Setting Hearing on Motion 78 First MOTION to Compel <i>Discovery</i> , and 91 MOTION to Compel <i>response to requests for production of documents</i> . Motion Hearing set for 3/10/2014 02:00 PM in Miami Division before Magistrate Judge William C. Turnoff. It is further ordered that Plaintiff shall file an expedited response to 91 Defendants' Motion to Compel by 5:00 p.m., Weds., March 5, 2014. Signed by Magistrate Judge William C. Turnoff on 2/27/2014. (mao) (Entered: 02/27/2014)
02/27/2014		Reset Deadline per DE 92 as to 91 MOTION to Compel <i>response to requests for production of documents</i> . Expedited Response due by 3/5/2014. (jua) (Entered: 02/27/2014)
02/27/2014	93	REPLY to Response to Motion re 78 First MOTION to Compel <i>Discovery</i> filed by Car Wash Experts, Inc., James McClimond, Mr. Foamer, Inc.. (Greenberg, Steven) (Entered: 02/27/2014)
03/03/2014	94	Re-Notice (second) to take Deposition Car Wash Experts by New Wave Innovations, Inc. re 92 Order Setting Hearing on Motion,, (Faro, John) Modified text on 3/3/2014 (jua). (Entered: 03/03/2014)
03/03/2014	95	Re-Notice (second) to Take Deposition of Mr. Foamer, Inc. by New Wave Innovations, Inc.(Faro, John) Modified text on 3/3/2014 (jua). (Entered: 03/03/2014)
03/03/2014	96	RE-NOTICE (Second) to Take Deposition of James McClimond by New Wave Innovations, Inc.(Faro, John) Modified text on 3/3/2014 (jua). (Entered: 03/03/2014)

03/03/2014	97	Notice of filing New Wave Response to Defendants Request to Produce by New Wave Innovations, Inc. re 92 Order Setting Hearing on Motion (Faro, John) Modified text on 3/3/2014 (jua). (Entered: 03/03/2014)
03/06/2014	98	Supplemental Motion to Compel to 91 MOTION to Compel <i>response to requests for production of documents</i> , 78 First MOTION to Compel <i>Discovery Supplemental Motion to Compel</i> by Car Wash Experts, Inc., James McClimond, Mr. Foamer, Inc.. (Attachments: # 1 Exhibit Exhibit A)(Greenberg, Steven) Modified to convert document to a motion on 3/7/2014 (asl). (Entered: 03/06/2014)
03/07/2014	99	Clerks Notice to Filer re 98 Response/Reply (Other),. Wrong Event Selected - Document is a Motion ; ERROR - The Filer selected the wrong event. A motion event must always be selected when filing a motion. The correction was made by the Clerk. It is not necessary to refile this document. (asl) (Entered: 03/07/2014)
03/10/2014	100	Minute Entry for proceedings held before Magistrate Judge William C. Turnoff: Motion Hearing held on 3/10/2014 re 78 First MOTION to Compel <i>Discovery</i> filed by Car Wash Experts, Inc., Mr. Foamer, Inc., James McClimond and 91 MOTION to Compel <i>response to requests for production of documents</i> filed by Car Wash Experts, Inc., Mr. Foamer, Inc., James McClimond. *Motions addressed. Oral arguments heard. Order to follow, consistent with instructions stated by the Court in open court. **APPEARANCES: John Faro, Esq. present on behalf of the Plaintiff. Adam D. Palmer, Esq. present on behalf of the Defendants. (Time: 2:00PM-2:38PM)(Digital 14:22:21.) (lw1) (Entered: 03/10/2014)
03/11/2014	101	ORDER granting 78 Motion to Compel; granting 91 Motion to Compel; deeming moot 98 Motion to Compel (Please see Order for further details). Signed by Magistrate Judge William C. Turnoff on 3/11/2014. (lw1) (Entered: 03/12/2014)
03/17/2014	102	NOTICE by New Wave Innovations, Inc. <i>Service of Response To Foamer Second Request For Production</i> (Faro, John) (Entered: 03/17/2014)
03/19/2014	103	First MOTION for Extension of Time To Comply With Order (DE # 101) re 101 Order on Motion to Compel,, by New Wave Innovations, Inc.. Responses due by 4/7/2014 (Faro, John) (Entered: 03/19/2014)
03/20/2014	104	PAPERLESS ORDER granting 103 Motion for Extension of Time to Comply with Court Order dated March 11, 2014. This entry constitutes the Paperless Order in its entirety. Signed by Magistrate Judge William C. Turnoff on 3/20/2014. (mao) (Entered: 03/20/2014)
03/20/2014	105	NOTICE by New Wave Innovations, Inc. <i>Service of Supplemental Response to Foamer 2nd Request for Production</i> (Faro, John) (Entered: 03/20/2014)
03/20/2014	106	NOTICE by New Wave Innovations, Inc. re 101 Order on Motion to Compel,, <i>Service of Supplemental /Response to Defendants First Request to Produce</i> (Faro, John) (Entered: 03/20/2014)
03/24/2014	107	WITHDRAWN - First MOTION to Strike 82 Objections to Report and Recommendations, 77 REPORT AND RECOMMENDATIONS re 17 MOTION for Preliminary Injunction <i>For Trademark & Trade Dress Infringement</i> filed by New Wave Innovations, Inc., 55 Response in Opposition to Motion, 85 MOTION for Hearing <i>On</i>

		<i>New Wave Objection To Magistrate R&R</i> by New Wave Innovations, Inc.. Responses due by 4/10/2014 (Faro, John) Modified to show that this document has been withdrawn per DE 108 on 3/25/2014 (jua). (Entered: 03/24/2014)
03/24/2014	108	WITHDRAWAL of Motion re 107 First MOTION to Strike 82 Objections to Report and Recommendations, 77 REPORT AND RECOMMENDATIONS re 17 MOTION for Preliminary Injunction <i>For Trademark & Trade Dress Infringement</i> filed by New Wave Innovations, Inc., 55 Respons filed by New Wave Innovations, Inc. (Faro, John) (Entered: 03/24/2014)
03/24/2014	109	MOTION to Strike 82 Objections to Report and Recommendations, 85 MOTION for Hearing <i>On New Wave Objection To Magistrate R&R</i> by New Wave Innovations, Inc.. Responses due by 4/10/2014 (Faro, John) (Entered: 03/24/2014)
03/24/2014	110	NOTICE by New Wave Innovations, Inc. re 109 MOTION to Strike 82 Objections to Report and Recommendations, 85 MOTION for Hearing <i>On New Wave Objection To Magistrate R&R Exhibit No. 3 to Motion to Strike</i> (Faro, John) (Entered: 03/24/2014)
03/28/2014	111	ORDER ADOPTING REPORT AND RECOMMENDATIONS ; Adopting 77 Report and Recommendations. Certificate of Appealability: No Ruling; denying 85 Motion for Hearing; denying 17 Motion for Preliminary Injunction Signed by Judge Marcia G. Cooke on 3/28/2014. (tm) (Entered: 03/28/2014)
04/02/2014	112	Notice of Appeal as to 111 Order Adopting Report and Recommendations,, Order on Motion for Hearing, Order on Motion for Preliminary Injunction,,, by New Wave Innovations, Inc.. Filing fee \$ 505.00 receipt number 113C-6620114. Within fourteen days of the filing date of a Notice of Appeal, the appellant must complete the Eleventh Circuit Transcript Order Form regardless of whether transcripts are being ordered [Pursuant to FRAP 10(b)]. For information go to our FLSD website under Transcript Information. (Faro, John) (Entered: 04/02/2014)
04/03/2014		Transmission of Notice of Appeal, Order Under Appeal and Docket Sheet to US Court of Appeals re 112 Notice of Appeal,, Notice has been electronically mailed. (amb) (Entered: 04/03/2014)
04/04/2014	113	Acknowledgment of Receipt of NOA from USCA re 112 Notice of Appeal,, filed by New Wave Innovations, Inc.. Date received by USCA: 4/3/2014. USCA Case Number: 14-11466-C. (amb) (Entered: 04/04/2014)
04/04/2014	114	MOTION for Summary Judgment by Car Wash Experts, Inc., James McClimond, Mr. Foamer, Inc.. Responses due by 4/21/2014 (Attachments: # 1 Statement of Uncontroverted Facts, # 2 Affidavit Declaration of Steven M. Greenberg, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit, # 6 Exhibit, # 7 Exhibit, # 8 Exhibit, # 9 Exhibit, # 10 Exhibit, # 11 Exhibit, # 12 Exhibit)(Greenberg, Steven) (Entered: 04/04/2014)
04/05/2014	115	MOTION for Leave to Amend to Add Their Counterclaims Against Plaintiff New Wave Innovations, Inc. (Responses due by 4/24/2014), by Car Wash Experts, Inc., James McClimond, Mr. Foamer, Inc.. (Attachments: # 1 Text of Proposed Order, # 2 Memorandum, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit, # 6 Exhibit, # 7 Exhibit, # 8 Exhibit, # 9 Exhibit, # 10 Exhibit, # 11 Exhibit)(Greenberg, Steven) Modified text on 4/7/2014 (jua). (Entered: 04/05/2014)

04/05/2014	116	MOTION Nunc Pro Tunc to Modify Order Setting Civil Trial Date and Pretrial Deadline re 62 Scheduling Order, Order Referring Case to Mediation, by New Wave Innovations, Inc.. Responses due by 4/24/2014 (Faro, John) Modified text on 4/7/2014 (jua). (Entered: 04/05/2014)
04/05/2014	117	NOTICE of Filing Exhibits by New Wave Innovations, Inc. re 116 MOTION Nunc Pro Tunc to Modify Civil Trial Date and Pretrial Deadlines re 62 Scheduling Order, Order Referring Case to Mediation (Faro, John) Modified text on 4/7/2014 (jua). (Entered: 04/05/2014)
04/07/2014	118	First MOTION to Produce <i>Documents, Including Corporate Book and Digital Accounting Records</i> by New Wave Innovations, Inc.. (Faro, John) (Entered: 04/07/2014)
04/07/2014	119	EXHIBITS <i>Nos. 1-6</i> by New Wave Innovations, Inc. re: 118 First MOTION to Produce <i>Documents, Including Corporate Book and Digital Accounting Records</i> filed by New Wave Innovations, Inc.. Related document: 118 First MOTION to Produce <i>Documents, Including Corporate Book and Digital Accounting Records</i> filed by New Wave Innovations, Inc..(Faro, John) (Entered: 04/07/2014)
04/07/2014	120	Case Reassignment of Paired Magistrate Judge pursuant to Administrative Order(s) 2013-63 to Magistrate Judge Edwin G. Torres. Magistrate Judge William C. Turnoff no longer assigned to case. Motions referred to Edwin G. Torres. (dm) (Entered: 04/08/2014)
04/08/2014	121	RESPONSE in Opposition re 109 MOTION to Strike 82 Objections to Report and Recommendations, 85 MOTION for Hearing <i>On New Wave Objection To Magistrate R&R</i> filed by Car Wash Experts, Inc., James McClimond, Mr. Foamer, Inc.. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit)(Greenberg, Steven) (Entered: 04/08/2014)
04/09/2014	122	Acknowledgment of Receipt of NOA from USCA re 112 Notice of Appeal,, filed by New Wave Innovations, Inc.. Date received by USCA: 4/3/2014. USCA Case Number: 14-11466-C. (amb) (Entered: 04/09/2014)
04/09/2014	123	ORDER granting in part and denying in part 116 Motion Nunc Pro Tunc to Modify Order Setting Civil Trial Date and Pretrial Deadlines. AMENDED SCHEDULING ORDER: Expert Discovery due by 7/8/2014. Fact Discovery due by 5/27/2014. Mediation Deadline 7/22/2014. Dispositive Motions due by 6/3/2014. In Limine Motions due by 9/30/2014. Motions due by 7/15/2014. Pretrial Stipulation due by 9/30/2014. Calendar Call set for 10/29/2014 03:00 PM in Miami Division before Judge Marcia G. Cooke. Jury Trial set for 11/3/2014 09:30 AM in Miami Division before Judge Marcia G. Cooke. Signed by Judge Marcia G. Cooke on 4/9/2014. (eah) (Entered: 04/09/2014)
04/10/2014	124	WITHDRAWAL of Motion by Car Wash Experts, Inc., James McClimond, Mr. Foamer, Inc. re 115 MOTION to Amend/Correct MOTION for Leave to File filed by Car Wash Experts, Inc., Mr. Foamer, Inc., James McClimond (Greenberg, Steven) (Entered: 04/10/2014)

04/10/2014	125	MOTION for Leave to Amend Answer by Mr. Foamer, Inc.. Responses due by 4/28/2014 (Attachments: # 1 Text of Proposed Order Proposed Order, # 2 Sealed Document, # 3 Exhibit Exhibit 1, # 4 Exhibit Exhibit 2, # 5 Exhibit Exhibit 3, # 6 Exhibit Exhibit 4, # 7 Exhibit Exhibit 5, # 8 Exhibit Exhibit 6, # 9 Exhibit Exhibit 7, # 10 Exhibit Exhibit 8, # 11 Exhibit Exhibit 9, # 12 Exhibit Exhibit 10, # 13 Exhibit Exhibit 11, # 14 Exhibit Exhibit 12)(Greenberg, Steven) Modified text on 4/11/2014 (jua). Modified by Sealing [125-2] per 154 Endorsed Order on 5/12/2014 (nc). (Entered: 04/10/2014)
04/16/2014	126	ORDER re: 118 Motion to Produce Undisclosed Documents. Upon review of the motion the Court finds good cause to direct that Defendants' response set forth good cause why sanctions should not be entered as per Rule 37(a)(5). Defendant's response shall be filed no later than April 21, 2014. Docket Order Signed by Magistrate Judge Edwin G. Torres on 4/16/2014. (EGT) (Entered: 04/16/2014)
04/18/2014	127	MOTION to Compel <i>Responses to Interrogatories</i> by Car Wash Experts, Inc., James McClimond, Mr. Foamer, Inc.. Responses due by 5/5/2014 (Attachments: # 1 Exhibit Exhibit 1, # 2 Text of Proposed Order Proposed Order)(Greenberg, Steven) (Entered: 04/18/2014)
04/18/2014	128	First MOTION for Extension of Time Respond to DE 114 re 114 MOTION for Summary Judgment by New Wave Innovations, Inc.. Responses due by 5/5/2014 (Faro, John) (Entered: 04/18/2014)
04/19/2014	129	RESPONSE in Opposition re 128 First MOTION for Extension of Time Respond to DE 114 re 114 MOTION for Summary Judgment filed by Car Wash Experts, Inc., James McClimond, Mr. Foamer, Inc.. (Greenberg, Steven) (Entered: 04/19/2014)
04/21/2014	130	ENDORSED ORDER granting 66 Motion to Amend Complaint. Plaintiff shall separately re-file its Second Amended Complaint on or before April 22, 2014 pursuant to Local Rule 15.1. Signed by Judge Marcia G. Cooke on 4/21/2014. (eah) (Entered: 04/21/2014)
04/21/2014	131	ENDORSED ORDER granting 125 Defendant Mr. Foamer's Motion for Leave to Amend. Defendant Mr. Foamer may assert its new counterclaims in its responsive pleading to Plaintiff's Second Amended Complaint, due within 14 days after Plaintiff files it in accordance with Federal Rule of Civil Procedure 15(a)(3). Signed by Judge Marcia G. Cooke on 4/21/2014. (eah) (Entered: 04/21/2014)
04/21/2014	132	ORDER EXPEDITING RESPONSE TO 127 Motion to Compel Discovery. Upon review of the motion and record, the Court finds good cause to expedite a response to the motion, in which Plaintiff shall also show cause why sanctions should not be entered. Plaintiff's response shall be filed no later than April 25, 2014. Docket Order Signed by Magistrate Judge Edwin G. Torres on 4/21/2014. (EGT) (Entered: 04/21/2014)
04/21/2014	133	ENDORSED ORDER denying <i>without prejudice</i> 114 Motion for Summary Judgment as premature in light of 130 ENDORSED ORDER granting Plaintiff's Motion to Amend Complaint and 131 ENDORSED ORDER granting Defendant Mr. Foamer's Motion for Leave to Amend. Signed by Judge Marcia G. Cooke on 4/21/2014. (eah) (Entered: 04/21/2014)

04/21/2014	134	ENDORSED ORDER denying as moot 128 Plaintiff's Motion for Extension of Time <i>Nunc Pro Tunc</i> to File an Opposition to Defendants' Motion for Summary Judgment in light of 133 ENDORSED ORDER denying without prejudice Motion for Summary Judgment as premature. Signed by Judge Marcia G. Cooke on 4/21/2014. (eah) (Entered: 04/21/2014)
04/21/2014	135	RESPONSE in Opposition re 118 First MOTION to Produce <i>Documents, Including Corporate Book and Digital Accounting Records</i> filed by Mr. Foamer, Inc.. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit)(Greenberg, Steven) (Entered: 04/21/2014)
04/21/2014		Reset Deadline per DE 132 as to 127 MOTION to Compel <i>Responses to Interrogatories</i> . Responses due by 4/25/2014 (jua) (Entered: 04/22/2014)
04/22/2014	136	Second AMENDED COMPLAINT against New Wave Innovations, Inc. filed in response to Order Granting Motion for Leave, filed by New Wave Innovations, Inc.. (Attachments: # 1 Exhibit New Wave invoices to McClimond, # 2 Exhibit New Wave Product Literature, # 3 Exhibit Foamer Product Literature, # 4 Exhibit Prov Patent SN. '278, # 5 Exhibit Prov Patent SN '876, # 6 Exhibit Foamer Christmas Card)(Faro, John) (Entered: 04/22/2014)
04/23/2014	137	VACATED ENDORSED ORDER Requiring Response. Defendants shall file, within fourteen days of this Order in accordance with S.D. Fla. L.R. 7.1(c)(1), their response in opposition, if any, to 109 Plaintiff's Motion to Strike the Defendants' Pleadings for Fraud Upon the Court, improperly labeled MOTION to Strike 82 Objections to Report and Recommendations, 85 MOTION for Hearing <i>On New Wave Objection To Magistrate R&R</i> . Signed by Judge Marcia G. Cooke on 4/23/2014. (eah) Modified to vacate per 142 Order on 4/28/2014 (asl). (Entered: 04/23/2014)
04/24/2014	138	RESPONSE/REPLY to 118 First MOTION to Produce <i>Documents, Including Corporate Book and Digital Accounting Records</i> , 135 Response in Opposition to Motion, <i>Reply to Defendant Opposition To Motion to Compel</i> by New Wave Innovations, Inc.. (Attachments: # 1 Exhibit Discovery Materials)(Faro, John) (Entered: 04/24/2014)
04/24/2014	139	NOTICE by New Wave Innovations, Inc. re 138 Response/Reply (Other), 118 First MOTION to Produce <i>Documents, Including Corporate Book and Digital Accounting Records Notice of Filing Defendants' Deposition Transcript</i> (Attachments: # 1 Transcripts Defendant March 25, 2014 Deposition, # 2 Transcripts Word Index March 25, 2014 Transcript)(Faro, John) (Entered: 04/24/2014)
04/25/2014	140	RESPONSE TO ORDER TO SHOW CAUSE re 132 Order on Motion to Compel, by New Wave Innovations, Inc.. (Faro, John) (Entered: 04/25/2014)
04/27/2014	141	MOTION TO DISMISS 136 Amended Complaint, FOR FAILURE TO STATE A CLAIM by Car Wash Experts, Inc., James McClimond, Mr. Foamer, Inc.. Responses due by 5/15/2014 (Attachments: # 1 Exhibit A - Report & Recommendation/Order Adopting R&R, # 2 Exhibit B - 2011 Mr. Foamer Christmas Card, # 3 Exhibit C - 2013 Mr. Foamer Christmas Card)(Maggio, Albert) (Entered: 04/27/2014)

04/28/2014	142	ENDORSED Order Vacating 137 Endorsed Order Requiring Response in light of 121 Defendants' Opposition to Plaintiff's Motion to Strike. Signed by Judge Marcia G. Cooke on 4/28/2014. (eah) (Entered: 04/28/2014)
04/28/2014	143	ENDORSED ORDER Requiring Reply. Plaintiff shall file, within seven days of this Order, in accordance with S.D. Fla. L.R. 7.1(c)(1), its reply in support of its Motion to Strike, if any. Signed by Judge Marcia G. Cooke on 4/28/2014. (eah) (Entered: 04/28/2014)
05/01/2014	144	REPLY to Response to Motion re 127 MOTION to Compel <i>Responses to Interrogatories</i> filed by Car Wash Experts, Inc., James McClimond, Mr. Foamer, Inc.. (Greenberg, Steven) (Entered: 05/01/2014)
05/01/2014	145	ORDER granting 118 Motion to Produce Digital Accounting Records; granting 127 Motion to Compel Complete Interrogatories. Signed by Magistrate Judge Edwin G. Torres on 5/1/2014. (EGT) (Entered: 05/01/2014)
05/05/2014		SYSTEM ENTRY - Docket Entry 146 [cmp] restricted/sealed until further notice. (nc) (Entered: 05/12/2014)
05/08/2014	147	(WITHDRAWN BY DE 148)NOTICE of Compliance <i>Supplemental Response to Defendants Interrogatories</i> by New Wave Innovations, Inc. re 145 Order on Motion to Produce, Order on Motion to Compel (Faro, John) Modified text on 5/9/2014 (tp). (Entered: 05/08/2014)
05/08/2014	148	NOTICE by New Wave Innovations, Inc. re 147 Notice of Compliance <i>Withdrawal of Notice Due to Inadvertantly Deleted Text From Attachment</i> (Faro, John) (Entered: 05/08/2014)
05/08/2014	149	NOTICE of Compliance <i>Supplemental Response to Defendants Interrogatories</i> by New Wave Innovations, Inc. re 145 Order on Motion to Produce, Order on Motion to Compel (Faro, John) (Entered: 05/08/2014)
05/08/2014	150	NOTICE of Compliance by Car Wash Experts, Inc., Mr. Foamer, Inc., James McClimond re 145 Order on Motion to Produce, Order on Motion to Compel (Greenberg, Steven) (Entered: 05/08/2014)
05/09/2014	151	MOTION to Seal by James McClimond, Mr. Foamer, Inc., Car Wash Experts, Inc. (Attachments: # 1 Text of Proposed Order)(nc) (Entered: 05/09/2014)
05/09/2014		SYSTEM ENTRY - Docket Entry 152 [misc] restricted/sealed until further notice. (nc) (Entered: 05/09/2014)
05/09/2014		SYSTEM ENTRY - Docket Entry 153 [misc] restricted/sealed until further notice. (nc) (Entered: 05/09/2014)
05/09/2014	154	ENDORSED ORDER granting 151 Defendants' Motion to Seal. Docket Entry Nos. [125-2] and [146] shall be sealed until further order of the Court. Signed by Judge Marcia G. Cooke on 5/9/2014. (eah) (Entered: 05/09/2014)
05/11/2014	155	<i>NEW WAVE INNOVATIONS</i> ANSWER and Affirmative Defenses to Counterclaim <i>OF MR. FOAMER, INC.</i> by New Wave Innovations, Inc.. (Faro, John) Modified tex ton 5/12/2014 (jua). (Entered: 05/11/2014)

05/11/2014	156	RESPONSE in Opposition re 141 MOTION TO DISMISS 136 Amended Complaint, FOR FAILURE TO STATE A CLAIM AS filed by New Wave Innovations, Inc.. (Faro, John) (Entered: 05/11/2014)
05/12/2014	157	CLERK'S NOTICE of Compliance by Sealing [125-2], 146 pursuant to 154 Endorsed Order. (nc) (Entered: 05/12/2014)
05/15/2014	158	MOTION for clarification and for Instructions from the Court by Car Wash Experts, Inc., James McClimond, Mr. Foamer, Inc.. Responses due by 6/2/2014 (Attachments: # 1 Exhibit Emails of Faro to Greenberg dated May 6, 7 and 8, 2014, # 2 Exhibit Email of Faro to Greenberg of May 14, 2014, # 3 Exhibit Letter of Greenberg to Faro of May 15, 2014, # 4 Text of Proposed Order)(Greenberg, Steven) Modified text on 5/16/2014 (jua). (Entered: 05/15/2014)
05/16/2014	159	NOTICE by New Wave Innovations, Inc. <i>Service of Subpoena To Produce Documents on T-Mobile For Cell Phone Records of Michael Ross, CEO of New Wave Innovations, Inc.</i> (Faro, John) (Entered: 05/16/2014)
05/19/2014	160	RESPONSE/REPLY to 156 Response in Opposition to Motion to Dismiss the Second Amended Complaint by Car Wash Experts, Inc., James McClimond, Mr. Foamer, Inc.. (Greenberg, Steven) (Entered: 05/19/2014)
05/19/2014	161	ENDORSED ORDER REFERRING MOTION. 158 MOTION for clarification filed by Car Wash Experts, Inc., Mr. Foamer, Inc., James McClimond is referred to the Honorable Edwin G. Torres pursuant to 28 U.S.C. § 636(b)(1)(A). Signed by Judge Marcia G. Cooke on 5/19/2014. (eah) (Entered: 05/19/2014)
05/28/2014	162	MOTION for Sanctions <i>against John H. Faro</i> by Car Wash Experts, Inc., James McClimond, Mr. Foamer, Inc.. (Attachments: # 1 Exhibit Exhibit A - Trademark application for the MR. FOAMER Mark filed by Mr. Foamer Inc., # 2 Exhibit Exhibit B - Mr. Foamer's responses and objections to New Wave's requests for production of documents, # 3 Exhibit Exhibit C - Emails from Faro to Jung)(Greenberg, Steven) (Entered: 05/28/2014)
05/28/2014	163	MOTION to Amend/Correct <i>Complaint & Add Parties</i> by New Wave Innovations, Inc.. Responses due by 6/16/2014 (Attachments: # 1 Exhibit Proposed Amended Complaint)(Faro, John) (Entered: 05/28/2014)
05/28/2014	164	NOTICE by New Wave Innovations, Inc. re 163 MOTION to Amend/Correct <i>Complaint & Add Parties Notice of Filing Exhibits</i> (Attachments: # 1 Exhibit Exhibits 2-4 To Motion To Amend Complaint)(Faro, John) (Entered: 05/28/2014)
06/02/2014	165	MOTION for an Order to Hold the Defendants and Their Counsel in Contempt of this Court's Stipulated Protective Order and for Sanctions by New Wave Innovations, Inc.. Responses due by 6/19/2014 (Faro, John). Added MOTION for Sanctions on 6/3/2014 (jua). (Entered: 06/02/2014)
06/02/2014	166	NOTICE by New Wave Innovations, Inc. re 165 MOTION for Contempt <i>For Repeated Violation of Stipulated Protective Order Filing of Exhibits 3-6 to Motion to Contempt</i> (Faro, John) (Entered: 06/02/2014)

06/02/2014	167	RESPONSE in Opposition re 158 MOTION for clarification , 165 MOTION for Contempt <i>For Repeated Violation of Stipulated Protective Order Notice of Reliance Upon Motion for Contempt as Basis For Response & Opposition to Motion for Clarification</i> filed by New Wave Innovations, Inc.. (Faro, John) (Entered: 06/02/2014)
06/02/2014	168	COMBINED FOURTH MOTION to Compel <i>Responses to Discovery Requests</i> (Responses due by 6/19/2014), First MOTION for Extension of Time to Complete Discovery , First MOTION for Extension of Time to extend the due date to complete discovery and to extend the due date to file dispositive motions re 123 Order on Motion for Extension of Time,, (Responses due by 6/19/2014) by Mr. Foamer, Inc., James McClimond, Car Wash Experts, Inc. (Greenberg, Steven) Modified text and to add filers on 6/3/2014 (jua). (Entered: 06/02/2014)
06/03/2014	169	Clerks Notice to Filer re 165 MOTION for Contempt <i>For Repeated Violation of Stipulated Protective Order</i> . Motion with Multiple Reliefs Filed as One Relief; ERROR - The Filer selected only one relief event and failed to select the additional corresponding events for each relief requested in the motion. The docket entry was corrected by the Clerk. It is not necessary to refile this document but future filings must comply with the instructions in the CM/ECF Attorney User's Manual. (jua) (Entered: 06/03/2014)
06/03/2014	170	MOTION for Summary Judgment and Memorandum of Law in Support <i>related to the Second Amended Complaint</i> by Car Wash Experts, Inc., James McClimond, Mr. Foamer, Inc.. Responses due by 6/20/2014 (Attachments: # 1 Statement of Uncontroverted Facts in Support of Defendants' Motion for Summary Judgment, # 2 Declaration of Steven M. Greenberg in Support of Defendants' Motion for Summary Judgment, # 3 Exhibit Transcript of James McClimond from Hearing of October 29, 2013, # 4 Exhibit Affidavit of James McClimond in Support of Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction, # 5 Exhibit Defendants' Second Set of Requests for Production to Plaintiff and Plaintiff's Responses, # 6 Exhibit Defendants' First Set of Requests for Production to Plaintiff and Plaintiff's Responses, # 7 Exhibit Invoices and Order Forms, # 8 Exhibit Transcript of Michael Ross' Deposition of March 27, 2014, # 9 Exhibit Defendants' First Set of Interrogatories to Plaintiff and Plaintiff's Responses, # 10 Exhibit Transcript of Michael Ross' Testimony at the Hearing of October 29, 2013, # 11 Exhibit Report and Recommendation of Magistrate Turnoff, # 12 Exhibit Two Emails Produced by Plaintiff in Response to Defendants' First Set of Requests for Production to Plaintiff, # 13 Exhibit Composite Exhibit Containing Several Emails Produced by Plaintiff in Response to Defendants' First Set of Requests for Production to Plaintiff, # 14 Exhibit Filing Receipt for Trademark Application for MR. FOAMER Filed by Mr. Foamer Inc., # 15 Exhibit Affidavit of Michael Ross Filed in Support of Plaintiff's Motion for Preliminary Injunction, # 16 Exhibit Affidavit of Courtney Chenowetch filed in Support of Plaintiff's Motion for Preliminary Injunction, # 17 Exhibit Transcript of James McClimond's Deposition of March 25, 2014)(Greenberg, Steven) Modified text on 6/4/2014 (jua). (Entered: 06/03/2014)
06/04/2014	171	MOTION for Sanctions <i>For Defendants Non-Compliance With Discovery Order [DE 145]</i> by New Wave Innovations, Inc.. Responses due by 6/23/2014 (Faro, John) Modified relief on 6/4/2014 (jua). (Entered: 06/04/2014)

06/04/2014	172	ORDER denying 168 Motion to Compel. The motion is clearly untimely as the discovery requests at issue were served only thirty days before the discovery cutoff date, and the pending motion was not filed until after the discovery cutoff date. Under the Court's Rules, all discovery must be served well in advance of the discovery cutoff in order to allow all responding parties to do so by that date. S.D. Fla. Local R. 26.1(f)(2); S.D. Fla. Local R. Gen. App. A (Discovery Practices Handbook) § I - E - (1) ("each Judge follows the rule that the completion date means that all discovery must be completed by that date [the discovery deadline]"). Accordingly, any motions to compel should be filed in advance of the discovery cutoff date in order to be deemed timely. As it stands now, no relief can be granted without an enlargement of the discovery period. We acknowledge that the pending motion also specifically requests that relief based upon the need for discovery following the filing of the counterclaims. This request is not addressed here and remains pending before the District Judge. Accordingly, the motion to compel is Denied but with leave to renew in the event that an enlargement is obtained. Docket Order Signed by Magistrate Judge Edwin G. Torres on 6/4/2014. (EGT) (Entered: 06/04/2014)
06/04/2014	173	Second MOTION to <i>Modify Order [DE 123] Setting Civil Trial Date and Pretrial Deadlines</i> by New Wave Innovations, Inc.. Responses due by 6/23/2014 (Faro, John) Modified text on 6/5/2014 (jua). (Entered: 06/04/2014)
06/04/2014	174	NOTICE by New Wave Innovations, Inc. re 173 Second MOTION to Continue <i>Modify Order [DE 123] Setting Civil Trial Date and Pretrial Deadlines Notice of Filing Exhibits to Motion to Modify</i> (Attachments: # 1 Exhibit Exhibits to Motion to Modify) (Faro, John) (Entered: 06/04/2014)
06/04/2014	175	RESPONSE in Opposition re 163 MOTION to Amend/Correct <i>Complaint & Add Parties</i> filed by Car Wash Experts, Inc., James McClimond, Mr. Foamer, Inc.. (Attachments: # 1 Exhibit 1 - Email of Glenn Benjamin, # 2 Exhibit 2 - Deposition Transcript of James McClimond of March 25, 2014, # 3 Exhibit 3 - Articles of Incorporation of Mr. Foamer Inc.)(Greenberg, Steven) (Entered: 06/04/2014)
06/10/2014	176	REPLY to Response to Motion re 158 MOTION for clarification filed by Car Wash Experts, Inc., James McClimond, Mr. Foamer, Inc.. (Attachments: # 1 Exhibit 1 - Ross Notes, # 2 Exhibit 2 - Deposition Transcript of Michael Ross, # 3 Exhibit 3 - Affidavit of Adam Palmer)(Greenberg, Steven) (Entered: 06/10/2014)
06/11/2014	177	ENDORSED ORDER deferring ruling on 173 Plaintiff's Motion to Modify Order Setting Civil Trial Date and Pretrial Deadline <i>Nunc Pro Tunc</i> . The parties are admonished that motions such as the instant Motion to Modify Order Setting Civil Trial Date and Pretrial Deadline must comply with Local Rule 7.1(a)(3) (pre-filing conference and certificate of compliance). Plaintiff shall notify the Court whether there is consent or opposition to its Motion to Modify Order Setting Civil Trial Date and Pretrial Deadline. Signed by Judge Marcia G. Cooke on 6/11/2014. (eah) (Entered: 06/11/2014)
06/11/2014	178	ENDORSED ORDER REFERRING MOTIONS. 162 MOTION for Sanctions <i>against John H. Faro</i> , 158 MOTION for clarification, 165 MOTION for Contempt <i>For Repeated Violation of Stipulated Protective Order</i> , and 171 Motion for Sanctions are referred to the Honorable Edwin G. Torres, under 28 U.S.C. § 636(c) & (e), for entry

		of a final order pursuant to the parties' 47 Election to Jurisdiction by a United States Magistrate Judge for Final Disposition of Motions. Signed by Judge Marcia G. Cooke on 6/11/2014. (eah) (Entered: 06/11/2014)
06/12/2014	179	VERIFIED MOTION to Strike 176 Reply to Response to Motion, 158 MOTION for clarification , 166 Notice (Other), 167 Response in Opposition to Motion, by New Wave Innovations, Inc.. Responses due by 6/30/2014 (Faro, John) Modified text on 6/13/2014 (jua). (Entered: 06/12/2014)
06/13/2014	180	MOTION for Extension of Time File Opposition to Defendant Motion for Summary Judgment [DE 170] re 173 Second MOTION to Continue <i>Modify Order [DE 123] Setting Civil Trial Date and Pretrial Deadlines</i> , 166 Notice (Other), 170 MOTION for Summary Judgment <i>related to the Second Amended Complaint</i> , 171 Motion for Sanctions by New Wave Innovations, Inc.. Responses due by 6/30/2014 (Faro, John) (Entered: 06/13/2014)
06/13/2014	181	NOTICE by New Wave Innovations, Inc. re 180 MOTION for Extension of Time File Opposition to Defendant Motion for Summary Judgment [DE 170] re 173 Second MOTION to Continue <i>Modify Order [DE 123] Setting Civil Trial Date and Pretrial Deadlines</i> , 166 Notice (Other), 170 <i>Filing Exhibits ##1 & 2 to Motion For Extension of Time</i> (Faro, John) (Entered: 06/13/2014)
06/15/2014	182	RESPONSE in Opposition re 180 MOTION for Extension of Time File Opposition to Defendant Motion for Summary Judgment [DE 170] re 173 Second MOTION to Continue <i>Modify Order [DE 123] Setting Civil Trial Date and Pretrial Deadlines</i> , 166 Notice (Other), 170 filed by Car Wash Experts, Inc., James McClimond, Mr. Foamer, Inc.. (Attachments: # 1 Exhibit 1 - Email re-representation by Greenspan, # 2 Exhibit 2- Email from Greenberg to Greenspan, # 3 Exhibit 3 - Subpoena to T-Mobile, # 4 Exhibit 4 - Email from Faro re-California law, # 5 Exhibit 5 - Guide QuickBooks, # 6 Exhibit 6 - Email from QuickBooks to McClimond)(Greenberg, Steven) (Entered: 06/15/2014)
06/16/2014	183	REPLY to Response to Motion re 180 MOTION for Extension of Time File Opposition to Defendant Motion for Summary Judgment [DE 170] re 173 Second MOTION to Continue <i>Modify Order [DE 123] Setting Civil Trial Date and Pretrial Deadlines</i> , 166 Notice (Other), filed by New Wave Innovations, Inc. (Faro, John) Modified text on 6/17/2014 (jua). (Entered: 06/16/2014)
06/19/2014	184	RESPONSE in Opposition re 171 Motion for Sanctions filed by Car Wash Experts, Inc., James McClimond, Mr. Foamer, Inc.. (Attachments: # 1 Exhibit 1 - Affidavit of James McClimond, # 2 Exhibit 2 - Composite Emails Between Plaintiff's counsel and Defendants' counsels, # 3 Exhibit 3 - Defendant Mr. Foamer's Responses to Plaintiff's Requests for Production, # 4 Exhibit 4 - Notice of Deposition of Mr. Foamer) (Greenberg, Steven) (Entered: 06/19/2014)
06/19/2014	185	RESPONSE in Opposition re 173 Second MOTION to Continue <i>Modify Order [DE 123] Setting Civil Trial Date and Pretrial Deadlines</i> filed by Car Wash Experts, Inc., James McClimond, Mr. Foamer, Inc.. (Attachments: # 1 Exhibit 1 - Affidavit of James McClimond, # 2 Exhibit 2 - Composite Emails Between Plaintiff's Counsel and Defendants' Counsel, # 3 Exhibit 3 - Defendant Mr. Foamer's Responses to Plaintiff's

		Requests for Production, # 4 Exhibit 4 - Notice of Deposition of Mr. Foamer) (Greenberg, Steven) (Entered: 06/19/2014)
06/25/2014	186	RESPONSE in Opposition re 179 MOTION to Strike 176 Reply to Response to Motion, 158 MOTION for clarification , 166 Notice (Other), 167 Response in Opposition to Motion, filed by Car Wash Experts, Inc., James McClimond, Mr. Foamer, Inc.. (Attachments: # 1 Exhibit 1 - Excerpted pages from deposition transcript of Michael Ross)(Greenberg, Steven) (Entered: 06/25/2014)
07/08/2014	187	RESPONSE in Opposition re 170 MOTION for Summary Judgment <i>related to the Second Amended Complaint Statement of Contested Facts In Support of Opposition to Defendants Motion for Summary Judgment</i> filed by New Wave Innovations, Inc.. (Faro, John) (Entered: 07/08/2014)
07/08/2014	188	RESPONSE in Opposition re 170 MOTION for Summary Judgment <i>related to the Second Amended Complaint</i> filed by New Wave Innovations, Inc.. (Faro, John) (Entered: 07/08/2014)
07/08/2014	189	NOTICE of Filing Appeal Brief re 170 MOTION for Summary Judgment <i>related to the Second Amended Complaint Notice of Fling Appeal Brief (relating to NEW WAVE Ownership of "Mr Foamer" trademark) In Support of Oppositoin [DE 188] to Defendants Motion for Summary Judgment [DE 170]</i> filed by New Wave Innovations, Inc. (Faro, John) Modified text and added link on 7/9/2014 (jua). (Entered: 07/08/2014)
07/08/2014	190	EXHIBITS <i>Notice of Filing Exhibit "A" referenced in DE 187 & 188</i> by New Wave Innovations, Inc. re: 188 Response in Opposition to Motion filed by New Wave Innovations, Inc., 187 Response in Opposition to Motion, filed by New Wave Innovations, Inc.. Related document: 188 Response in Opposition to Motion filed by New Wave Innovations, Inc., 187 Response in Opposition to Motion, filed by New Wave Innovations, Inc..(Faro, John) (Entered: 07/08/2014)
07/08/2014	191	EXHIBITS <i>Notice of Filing Exhibits "B" to "E" referenced in DE 187 & 188</i> by New Wave Innovations, Inc. re: 188 Response in Opposition to Motion filed by New Wave Innovations, Inc., 187 Response in Opposition to Motion, filed by New Wave Innovations, Inc.. Related document: 188 Response in Opposition to Motion filed by New Wave Innovations, Inc., 187 Response in Opposition to Motion, filed by New Wave Innovations, Inc.. (Attachments: # 1 Exhibit Exhibits "B" to "E")(Faro, John) (Entered: 07/08/2014)
07/08/2014	192	EXHIBITS <i>Notice of Filing Exhibits "F" to "H" referenced in DE 187 & 188</i> by New Wave Innovations, Inc. re: 188 Response in Opposition to Motion filed by New Wave Innovations, Inc., 187 Response in Opposition to Motion, filed by New Wave Innovations, Inc.. Related document: 188 Response in Opposition to Motion filed by New Wave Innovations, Inc., 187 Response in Opposition to Motion, filed by New Wave Innovations, Inc.. (Attachments: # 1 Exhibit Exhibits "F" to "H")(Faro, John) (Entered: 07/08/2014)
07/08/2014	193	OMNIBUS ORDER: denying as moot 158 Motion for Clarification; denying 162 Motion for Sanctions with leave to renew; denying 165 Motion for Contempt; denying 165 Motion for Sanctions; granting in part and denying in part 171 Motion for

		Sanctions. Signed by Magistrate Judge Edwin G. Torres on 7/8/2014. (EGT) (Entered: 07/08/2014)
07/11/2014	194	ORDER denying as moot 179 Motion to Strike. Docket Order Signed by Magistrate Judge Edwin G. Torres on 7/11/2014. (EGT) (Entered: 07/11/2014)
07/11/2014	195	NOTICE of Compliance by Car Wash Experts, Inc., Mr. Foamer, Inc., James McClimond re 193 Order on Motion for Clarification, Order on Motion for Sanctions, Order on Motion for Contempt,,,,,, (Attachments: # 1 Exhibit A - Email from Greenberg to Faro enclosing QBB File)(Greenberg, Steven) (Entered: 07/11/2014)
07/11/2014	196	MOTION to Strike 188 Response in Opposition to Motion, 192 Exhibits,, 191 Exhibits,, 187 Response in Opposition to Motion, 190 Exhibits, 189 Response in Opposition to Motion, by Car Wash Experts, Inc., James McClimond, Mr. Foamer, Inc.. Responses due by 7/28/2014 (Attachments: # 1 Exhibit A - Email from Faro to Jung)(Greenberg, Steven) (Entered: 07/11/2014)
07/16/2014	197	Pursuant to F.R.A.P. 11(c), the Clerk of the District Court for the Southern District of Florida certifies that the record is complete for purposes of this appeal re: 112 Notice of Appeal,, Appeal No. 14-11466-CC. The entire record on appeal is available electronically. (amb) (Entered: 07/16/2014)
07/21/2014	198	ENDORSED ORDER denying as moot 180 Motion for Extension of Time. Signed by Judge Marcia G. Cooke on 7/21/2014. (eah) (Entered: 07/21/2014)
08/11/2014	199	Second MOTION for Sanctions <i>Under Rule 37</i> by New Wave Innovations, Inc.. (Attachments: # 1 Affidavit Forensic Account Affidavit - Redacted, # 2 Exhibit Document Poduction Req & Notice of Depo duces tecu, # 3 Exhibit Order May 1, 2014 DE 145, # 4 Exhibit Order July 8, 2014 DE 193, # 5 Exhibit Attorney Greenberg Certification)(Faro, John) (Entered: 08/11/2014)
08/18/2014		SYSTEM ENTRY - Docket Entry 200 [misc] restricted/sealed until further notice. (nc) (Entered: 08/18/2014)
08/25/2014	201	RESPONSE in Opposition re 199 Second MOTION for Sanctions <i>Under Rule 37</i> filed by Car Wash Experts, Inc., James McClimond, Mr. Foamer, Inc.. (Attachments: # 1 Exhibit A - Email from Greenberg to Faro enclosing Second Quickbooks File, # 2 Exhibit B - Email from Jung to Faro, # 3 Exhibit C - Affidavit of James McClimond, # 4 Exhibit D - Intuit Quickbooks Profile of Gary Kaplan, # 5 Exhibit E - Affidavit of Gary Kaplan)(Greenberg, Steven) (Entered: 08/25/2014)
09/24/2014	202	NOTICE of Attorney Appearance by Meredith Chaiken-Weiss on behalf of Car Wash Experts, Inc., James McClimond, Mr. Foamer, Inc.. Attorney Meredith Chaiken-Weiss added to party Car Wash Experts, Inc.(pty:dft), Attorney Meredith Chaiken-Weiss added to party James McClimond(pty:dft), Attorney Meredith Chaiken-Weiss added to party Mr. Foamer, Inc.(pty:dft), Attorney Meredith Chaiken-Weiss added to party Mr. Foamer, Inc.(pty:cc). (Chaiken-Weiss, Meredith) (Entered: 09/24/2014)
09/28/2014	203	MOTION for Sanctions <i>Under Rule 11 Pertaining to Plaintiff's Renewed Motion for Sanctions Against Mr. Foamer Inc. for Non-Compliance with Court Orders [DE 145]</i> by Car Wash Experts, Inc., James McClimond, Mr. Foamer, Inc.. (Attachments: # 1 Exhibit A - Email from Greenberg to Faro enclosing Second Quickbooks File, # 2

		Exhibit B - Email from Jung to Faro, # 3 Exhibit C - Affidavit of Gary Kaplan, # 4 Exhibit D - Affidavit of James McClimond)(Greenberg, Steven) (Entered: 09/28/2014)
09/29/2014	204	First MOTION to Stay re 193 Order on Motion for Clarification, Order on Motion for Sanctions, Order on Motion for Contempt,,,,,, 199 Second MOTION for Sanctions <i>Under Rule 37</i> by New Wave Innovations, Inc.. Responses due by 10/17/2014 (Attachments: # 1 Exhibit New Wave Innovation Appeal Brief, # 2 Exhibit Trademark Opp at Trademark Trial & Appeal Board)(Faro, John) (Entered: 09/29/2014)
09/29/2014	205	MOTION in Limine to <i>Preclude Evidence Challenging Potential Registerability of terms MR FOAMER as a trademark</i> by New Wave Innovations, Inc.. (Attachments: # 1 Exhibit Judicial Notice Trademark Office files)(Faro, John) (Entered: 09/29/2014)
09/30/2014	206	ORDER GRANTING PLAINTIFF'S UNOPPOSED MOTION TO STAY LITIGATIONgranting 204 Motion to Stay and administratively closing the case. Signed by Judge Marcia G. Cooke on 9/30/2014. (tm) (Entered: 09/30/2014)
09/30/2014		Civil Case Terminated. Closing Case. (tm) NOTICE: If there are sealed documents in this case, they may be unsealed after 1 year or as directed by Court Order, unless they have been designated to be permanently sealed. See Local Rule 5.4 and Administrative Order 2014-69. (Entered: 09/30/2014)
09/30/2014	207	Clerks Notice of Docket Correction re 206 ORDER GRANTING PLAINTIFF'S UNOPPOSED MOTION TO STAY LITIGATION. Incorrect Document Link. Corrected ORDER GRANTING PLAINTIFF'S UNOPPOSED MOTION TO STAY LITIGATION linked to this Docket Entry. (eah) (Entered: 10/01/2014)
02/19/2015	208	MANDATE of USCA (certified copy) AFFIRM Judgment/ Order of the district court with courts opinion re 112 Notice of Appeal,, filed by New Wave Innovations, Inc. ; Date Issued: 2/19/2015 ; USCA Case Number: 14-11466-CC (amb) (Entered: 02/19/2015)

PACER Service Center			
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04/27/2015 09:44:09			
PACER Login:	fa0411:2697984:0	Client Code:	S
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 13-22541-Civ-COOKE/TURNOFF

NEW WAVE INNOVATIONS, INC.,

Plaintiff,

vs.

JAMES (JIM) MCCLIMOND, MR. FOAMER,
INC. and CAR WASH EXPERTS, INC.,

Defendants.

ORDER ADOPTING MAGISTRATE'S REPORT AND RECOMMENDATION

THIS MATTER is before me upon the Honorable William C. Turnoff's, U.S. Magistrate Judge, Report and Recommendation (ECF No. 77) regarding Plaintiff's Motion for Preliminary Injunction (ECF No. 17), which was referred to Judge Turnoff pursuant to 28 U.S.C. § 636(b)(1)(A), *see* Order Referring Motion (ECF No. 26).

In his Report, Judge Turnoff recommended that Plaintiff's Motion for Preliminary Injunction be denied because Plaintiff is unlikely to succeed on the merits of its case because "New Wave can only establish *diminis* or token uses of the Mark during Christmas 2011," Report at 8, not the "actual and continuous prior use in commerce" required to assert trademark rights. Report at 6 (citing *Tally-Ho, Inc. v. Coast Community College Dist.*, 889 F.2d 1018, 1022 (11th Cir. 1989)).

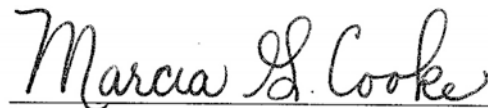
I thoroughly have conducted a *de novo* review of Plaintiff's Motion for Preliminary Injunction, the briefing and exhibits regarding the same, the Report and Recommendation, New Wave Innovations, Inc.'s Objection to Magistrate Report and Recommendation Denying Motion for Preliminary Injunction (ECF No. 82), Defendant's Opposition to Plaintiff's Objection to the Report and Recommendation Denying Plaintiff's Motion for a Preliminary Injunction (ECF No. 82), the record, and the relevant legal authority. After review of the same, I find Judge Turnoff's Report clear, cogent, and compelling.

Accordingly, Judge Turnoff's Report and Recommendation (ECF No. 77), is **AFFIRMED and ADOPTED** as the Order of this Court. It is hereby **ORDERED and**

ADJUDGED that Plaintiff's Motion for Preliminary Injunction (ECF No. 17) is **DENIED**.

IT IS FURTHER **ORDERED and ADJUDGED** that Plaintiff's Request for Oral Hearing on New Wave Innovations, Inc.'s Objection to Magistrate Report and Recommendation Denying Motion for Preliminary Injunction (ECF No. 85) is **DENIED as moot**.

DONE and ORDERED in chambers, at Miami, Florida, this 28th day of March 2014.

A handwritten signature in black ink, reading "Marcia G. Cooke". The signature is written in a cursive, flowing style. Below the signature is a horizontal line.

MARCIA G. COOKE

United States District Judge

Copies furnished to:

William C. Turnoff, U.S. Magistrate Judge
Counsel of record

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

Case No. 14-11466-C

NEW WAVE INNOVATIONS, INC.,

Appellant,

v.

JAMES MCCLIMOND, ET AL.

Appellees.

INITIAL BRIEF OF THE APPELLANT

On Appeal from the United States District Court
Southern District of Florida, Miami Division
1:13-cv-22541-MGC

DONNA GREENSPAN SOLOMON
Florida Bar No. 059110
Donna@SolomonAppeals.com
**SOLOMON APPEALS, MEDIATION &
ARBITRATION**
901 So. Federal Hwy, Ste. 300
Ft. Lauderdale, FL 33316
Telephone: 561-762-9932

JOHN FARO
Florida Bar No. 527459
johnf75712@aol.com

FARO & ASSOCIATES

1395 Brickell Avenue – Suite 800

Miami, FL 33131

Telephone: 305-761-6921

**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

In compliance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1 and 26.1-3, the undersigned hereby certifies that the following is a complete list of the trial judges, all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

Car Wash Experts, Inc. (Appellee-Defendant)

Cooke, Hon. Marcia G.

CRGO Greenberg, LLC, d/b/a CRGO Law (Counsel for Appellees-
Defendants)

CRGO Law (Counsel for Appellees-Defendants)

Donna Greenspan Solomon, P.A., d/b/a Solomon Appeals, Mediation
& Arbitration (Counsel for Appellant)

Faro & Associates, LLC (Counsel for Appellant-Plaintiff)

Faro, John H. - Faro & Associates (Counsel for Appellant-Plaintiff)

Greenberg, Steven M. - CRGO Law (Counsel for Appellees-
Defendants)

Jung, Isabelle - CRGO Law (Counsel for Appellees-Defendants)

Maggio, Jr., Albert B. - CRGO Law (Counsel for Appellees-
Defendants)

McClimond, James (Appellee-Defendant)

Mr. Foamer, Inc. (Appellee-Defendant)

New Wave Innovations, Inc. (Appellant-Plaintiff)

Palmer, Adam P. - Schoeppl & Burke, P.A. (Counsel for Appellees-
Defendants)

Schoeppl & Burke, P.A. (Counsel for Appellees-Defendants)

Solomon, Donna Greenspan – Solomon Appeals, Mediation &
Arbitration (Counsel for Appellant)

Solomon Appeals, Mediation & Arbitration (Counsel for Appellant)

Torres, Hon. Edwin G.

Turnoff, Hon. William C.

STATEMENT REGARDING ORAL ARGUMENT

Appellants request oral argument in this appeal. Oral argument should be heard as this case presents a question of first impression regarding the bona fide use of a “seasonal” or “holiday” mark in the ordinary course of trade.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT.....	i
STATEMENT REGARDING ORAL ARGUMENT.....	ii
TABLE OF CONTENTS.....	iv
TABLE OF CITATIONS.....	vi
STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION.....	1
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE.....	1
A. Procedural History.....	1
B. Statement of Facts.....	2
C. Statement of The Standard or Scope of Review for Each Contention.....	12
SUMMARY OF THE ARGUMENT	12
ARGUMENT	13
I. THE DISTRICT COURT ERRED IN ACCEPTING THE MAGISTRATE’S FINDING THAT NEW WAVE FAILED TO SHOW USE OF THE “MR. FOAMER” MARK IN COMMERCE IN CONNECTION WITH THE SALE OF ANY GOOD OR SERVICE.....	13
II. THE DISTRICT COURT ERRED IN ACCEPTING THE MAGISTRATE’S FINDING THAT NEW WAVE CAN ESTABLISH ONLY <i>DE MINIMIS</i> OR TOKEN USE OF THE MARK	14

CONCLUSION	17
CERTIFICATE OF COMPLIANCE.....	vii
CERTIFICATE OF SERVICE.....	viii

TABLE OF CITATIONS

Cases

<i>Carillon Imp. Ltd. v. Frank Pesce InrI Group Ltd.</i> , 112 F.3d 1125	
(11 th Cir. 1997).....	11
<i>Cumulus Media, Inc. v. Clear Channel Communications, Inc.</i> , 304 F.3d	
1167 (11th Cir. 2002).....	15
<i>Frehling Enters., Inc. v. Int'l Select Group, Inc.</i> , 192 F.3d 1330	
(11th Cir. 1999).....	11
<i>Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc.</i> , 299 F.3d 1242	
(11th Cir. 2002).....	11
<i>Natural Answers, Inc. v. Smithkline Beecham Corporation</i> , 529 F.3d 1325	
(11th Cir. 2008).....	15
<i>Paramount Pictures Corp. v. White</i> , 31 USPQ2d 1768 (TTAB 1994), <i>aff'd</i> ,	
108 F.3d 1392 (Fed. Cir. 1997) (Table).....	17

Statutes

28 U.S.C. § 1292.....	1
-----------------------	---

Other Authorities

TMEP § 901.01	16
TMEP § 902.02.....	16, 17

**STATEMENT OF SUBJECT-MATTER AND
APPELLATE JURISDICTION**

This appeal is from an interlocutory order denying a motion for preliminary injunction. The Court thus has appellate jurisdiction pursuant to 28 U.S.C. § 1292 (a)(1).

The order was rendered on March 28, 2014, and the notice of appeal was timely filed on April 2, 2014.

STATEMENT OF THE ISSUES

1. Whether the district court erred in accepting the magistrate's finding that New Wave failed to show use of the "Mr. Foamer" mark in commerce in connection with the sale of any good or service.

2. Whether the district court erred in accepting the magistrate's finding that New Wave can establish only *de minimis* or token use of the mark.

STATEMENT OF THE CASE

A. Procedural History

On April 2, 2014, Appellant New Wave Innovations, Inc. ("New Wave" or "Appellant") timely filed a Notice of Final Appeal (DC DE #112) from an interlocutory Order Adopting Magistrate's Report and Recommendation (DC DE #111), rendered on March 28, 2014. The Magistrate's Report and Recommendation (DC DE #77) denied Appellant's Motion for Preliminary

Injunction (DC DE #17) against appellees James McClimond, Car Wash Experts, and Mr. Foamer, Inc. (collectively, “Appellees”).

B. Statement of Facts

Appellant New Wave designs, engineers, manufactures and distributes propriety products to the automatic, commercial car wash industry. (DC DE #17-1¹, pp. 2-3). New Wave’s products include a Turbo Foam Generator and its accessory, the Elephant Ears Foam Applicator. (DC DE #54, p. 4-5).

The Turbo Foam Generator has a distinctive and proprietary design or trade dress, as follows:

- (a) Color (black) of the elements of the foam insert;
- (b) Size and number of alternating elements in the foam insert;
- (c) Arrangement of elements of the foaming insert vis-à-vis one another, as seen within the transparent housing of their Turbo Foam Generator;
- (d) Number and placement of the inlets on each side of the transparent housing; and a
- (e) Transparent housing to display the inner unique architecture/features set forth in (a) to (d) above.

¹ As noted below, the magistrate stated that the affidavits filed in support and in opposition to the motion for preliminary injunction “were to be in lieu of direct testimony to save everybody time, so the record is clear.” (DE #1, p.8).

(DC DE #54, pp. 7-8).

In November 2011, Appellee McClimond and his company, Appellee Car Wash Experts, contacted New Wave to discuss purchasing its products. (DC DE #61, p. 164). Notably, this was before McClimond incorporated (Appellee) “Mr. Foamer, Inc.” or began producing its own product (which, as discussed below, is confusingly similar to the trade dress of New Wave’s product):

THE COURT: You're talking about you approached New Wave?

MCCLIMOND: Yes. I approached New Wave.

THE COURT: Okay.

MCCLIMOND: Yes.

DEFENDANT’S COUNSEL: To be clear, that was before you had formed Mr. Foamer and before you had created a product of your own?

A. Absolutely. Yes. . . .

(DC DE #61, p. 164) (emphasis supplied).

Also in November 2011, New Wave sent a Christmas card (“Christmas Card”) to “all customers and prospective customers listed in its database,” (DC DE #77, p.3), including McClimond and Car Wash Experts. (DC DE #61, pp. 39-40). The 2011 Christmas Card includes a cartoon-like depiction of a foam generator called “Mr. Foamer” wearing a Santa hat. (Exh. 1; DC DE #77, p.7).

“Mr. Foamer” is an unregistered service mark (“Mark”) that is

suggestive of services for the distribution of products that create foam. (DC DE #77, p. 3). New Wave used the Mr. Foamer Mark for the first time in its 2011 Christmas Card. The 2011 Christmas Card also includes a coupon solicitation for New Wave products. (DC DE #61, p. 80).

According to McClimond, the business relationship with New Wave that he initiated in November 2011 continued to early March 2012, when his purchase of product from New Wave was actually concluded. (DC DE #61, p. 164).

Just four (4) months later, in July 2012, McClimond incorporated a new company under the name “Mr. Foamer, Inc.” (DC DE #61, p. 164). Mr. Foamer, Inc., targets the same market as New Wave, and its corporate name obviously is confusingly similar to New Wave’s own “Mr. Foamer” Mark. In addition, in August 2012, Mr. Foamer, Inc. began selling a product called “Twist ‘n Kleer,” which has a design confusingly similar to New Wave’s Turbo Foam Generator trade dress. (DC DE #51, p.7; #61, pp. 30, 129).

As a result, actual confusion (including reverse confusion²) arose in the

² “The usual trademark infringement case involves a claim by a plaintiff with a substantial investment in a well-established trademark. The plaintiff would then seek recovery for the loss of income resulting from a second user attempting to trade on the goodwill associated with that established mark by suggesting to the consuming public that his product comes from the same origin as the plaintiff’s product.” *Inmuno Vital, Inc. v. Golden Sun, Inc.*, 49 F. Supp. 2d 1344, 1351-52 (S.D. Fla. 1997).

marketplace with respect to the confusingly-similar Mr. Foamer Twist 'n Kleer foam generator *vis-à-vis* New Wave's Turbo Foam Generator. (DC DE 48, pp. 4-5). Because of this confusion, New Wave suspended further use of its "holiday" or "seasonal" Mr. Foamer Mark, and, beginning in the fall of 2012, made several attempts to contact McClimond in order to informally resolve the dispute. (DC DE #61, p.39). When such efforts were ignored, New Wave was forced to file suit.

On July 16, 2013, New Wave filed the underlying action against Appellees. (DC DE #77, p. 1). New Wave filed an Amended Complaint on August 5, 2013. (DC DE #13-1). The Amended Complaint alleges, among other things, trademark infringement (Florida common law), unfair competition/false designation of origin and unfair competition/trade dress infringement (Lanham Act), breach of confidential business relationship, and violations of Florida's Deceptive and Unfair Trade Practices Act ("FDUTP A"). (DC DE #13-1).

On August 20, 2013, New Wave filed an Emergency Motion for

As in *Inmuno Vital*, however, this case involves the doctrine of "reverse confusion." Under this doctrine, "the infringer's use of the original user's mark creates sufficient confusion that the relevant market does not know who created the original product." *Id.* (citing *Capital Films Corp. v. Charles Fries Productions, Inc.*, 628 F.2d 387, 393 (5th Cir.1980)). Under *Capital Films*, "the reverse confusion doctrine is presumed to apply in the Eleventh Circuit." *Id.*

Preliminary Injunction, seeking *inter alia* to prohibit Appellees from using the name “Mr. Foamer.” (DC DE #17). Affidavits were filed in support and in opposition to the motion for preliminary injunction. (DC DE # 54, 48, 50).

An evidentiary hearing was held on October 29, 2013 (DC DE #61). At the October 29, 2013 hearing, Magistrate Judge William C. Turnoff made clear for the record that affidavits previously filed in support and in opposition to the motion for preliminary injunction “were to be in lieu of direct testimony to save everybody time.” (DC DE #61, p.8).

Michael James Ross (“Ross”), the CEO, president and founder of New Wave, testified on behalf of the company. (DC DE#61, pp.4, 38). Ross described the holiday/seasonal nature of the Mr. Foamer Mark contained within New Wave’s Christmas Card:

A. . . . The Christmas card was our product dressed up like Santa Claus in a fashion. So that is why we didn't send it out again. We were planning to send it out again at Christmastime.

* * *

Q. I’d like to show you, Mr. Ross, what’s been marked for identification as New Wave Exhibit No. 1. Have you seen that before?

A. Yes, I have. I created it.

Q. What is it, sir?

A. It’s a picture of our foam generator that we put cartoonish, eyes, an actual picture of a Santa hat, a cartoonish hand holding a banner that says “Merry Christmas from Mr. Foamer.”

Q. And in creating that Christmas card, what was your intent to convey in that picture?

A. Our product as a cartoonish mascot with the holiday spirits of Christmas.

Q. And the use of Mr. Foamer was intended to connote what?

A. Our mascot that we were trying to intend to portray as, you know, our holiday products.

(DC DE #61, pp. 39-41).

Ross also testified that the Card containing the Mr. Foamer Mark was sent to New Wave's entire database, specifically including McClimond and Car Wash Experts:

Q. . . . Could you explain to the Court to whom the Christmas card was distributed.

A. Yes. The Christmas card was distributed to our entire database that we had in our system for all current customers and even customers that just made simple queries that we had their mailing address for.

* * *

Q. Was either of the -- any of the Defendants included in the database at the time you conducted the mailing of the Christmas card?

A. Yes.

Q. Who was included in the database?

A. Car Wash Experts.

Q. Do you know if Car Wash Experts and Mr. McClimond have the

same address?

A. The address we have is his commercial address in Jupiter.

(DC DE #61, pp. 39-40).

In 2012, Ross was contacted by customers/distributors who had become confused by the products offered and sold by Mr. Foamer, Inc. Such confusion arose from a combination of factors:

- (1) Mr. Foamer, Inc.'s products were confusingly similar in appearance to the trade dress of New Wave's products; and
- (2) Mr. Foamer, Inc.'s corporate name was confusingly similar to the Mr. Foamer Mark, which identified and distinguished New Wave as having an expertise in the type of equipment used by the automatic car wash industry.

Ross testified to the confusion as follows:

A. The customer called our office, which is our 800 number, and I answered the phone. They were calling because they wanted a refund. The refund –

Q. A refund for what?

A. For the generators.

Q. What generator?

A. At the time -- at the beginning of the phone call, it was . . . believed [to be] it was our generator.

Q. Okay.

A. When we went through extensive description of where his products were failing, at that time, I realized that that was not our product and that it was a Mr. Foamer product.

* * *

Q. . . . What exactly did the customer want and what was your response to that?

A. The customer wanted a refund. And after we determined it was not our product, he had no interest anymore and he was going to contact who he purchased from.

* * *

THE COURT: . . . why would he call you?

A. He said that he was looking on YouTube on video and, because it's – if you put in the description of it, it pops up our videos . . . and he couldn't tell the difference.

* * *

Q. So it's conceivable, is it not, that the product that was depicted on your YouTube was indistinguishable from the product that he had?

* * *

A. If you look on YouTube at the products, you cannot tell the difference in the videos. You have to look at the actual wording and addresses.

(DC DE #61, p. 42-45) (emphasis supplied).

Ross also testified that the confusion of the customers/distributors led to his temporary suspension of use of the Mark:

Q. Once you became aware that there were -- there was another company using Mr. Foamer and you had some experience with customers calling you and complaining about Mr. Foamer products, did you have any concerns regarding your continued use of the Mr. Foamer service mark?

A. Yes.

Q. Could you explain those, please.

A. With the confusion that was starting to present itself, I suspended the use of the Mr. Foamer Christmas card or any other form of our generator holiday special until the matter could be resolved.

(DC DE #61, p. 46-47).

On cross-examination, Ross clarified that the 2011 Christmas Card included a coupon solicitation for New Wave products:

Q: And, there's no offer to sell anything in this [2011 Christmas Card], is there?

A: Yeah. On the inside, actually, there was. We actually did a coupon.

(DC DE #61, p. 80).

Judge Turnoff issued a Report and Recommendation ("Report") on January 24, 2014. (DC DE #77). In his Report, Judge Turnoff found that New Wave had failed to show use of the "Mr. Foamer mark . . . in commerce in connection with the sale of any good or service." (DC DE #77, p. 7). However, such finding overlooks the undisputed testimony that the 2011 Christmas Card in fact included a coupon solicitation for New Wave products. (DC DE #61, p. 80).

Judge Turnoff also found that New Wave failed to show a substantial likelihood that it will successfully establish that it owns the Mark because "New Wave can only establish *diminis* [stet] or token uses of the Mark during

Christmas 2011.” (DC DE #77, p.8). As explained below, however, Judge Turnoff failed to take into account the seasonal/holiday nature of the Mark, especially in view of the Trademark Law Revision Act of 1988 (“TLRA”), which added the phrase “bona fide use of a mark in the ordinary course of trade” to recognize that “the ordinary course of trade” varies from industry to industry.

In order to obtain a preliminary injunction, a plaintiff must show, *inter alia*, a substantial likelihood of success on the merits of the underlying case. *Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc.*, 299 F.3d 1242, 1246-47 (11th Cir. 2002) (citing *Carillon Imp. Ltd. v. Frank Pesce InrI Group Ltd.*, 112 F.3d 1125, 1126 (11th Cir. 1997)). In order to show a substantial likelihood of success on the merits of a common law trademark infringement, a plaintiff must show that (1) its mark is valid and has priority, and that (2) the defendants’ mark is likely to cause considerable confusion. *Frehling Enters., Inc. v. Int’l Select Group, Inc.*, 192 F.3d 1330, 1335 (11th Cir. 1999).

However, Judge Turnoff found that given the findings above, it was “not necessary to discuss the similarities, or lack thereof, between the parties’ products.” (DC DE #77, p. 9). Judge Turnoff also did not decide whether Appellees’ use of “Mr. Foamer, Inc.” for the name of its business entity was confusingly similar to New Wave’s “Mr. Foamer” Mark.

On March 28, 2014, the district court entered the Order Adopting Magistrate's Report and Recommendation (DC DE #111). This appeal now follows.

C. Statement of The Standard or Scope of Review for Each Contention

I. Contention: The district court erred in accepting the magistrate judge's finding that New Wave failed to show use of the "Mr. Foamer" Mark in commerce with the sale of any good or service.

Standard or Scope of Review: The fact findings of the magistrate judge under Federal Rule of Civil Procedure 52(a)(2) are clearly erroneous.

II. Contention: The district court erred in accepting the magistrate judge's finding that New Wave can establish only *de minimis* or token use of the Mark.

Standard or Scope of Review: The magistrate judge erred as a matter of law in finding that New Wave can establish only *de minimis* or token use of the Mark.

SUMMARY OF THE ARGUMENT

The district court erred in accepting the magistrate's finding that New Wave failed to show use of the "Mr. Foamer" mark in commerce in connection with the sale of any good or service. The undisputed testimony at the October 29, 2013 hearing showed that the 2011 Christmas Card in fact included a

coupon solicitation for New Wave products.

The district court further erred in accepting the magistrate's finding that New Wave can establish only *de minimis* or token use of its Mr. Foamer Mark. The Mr. Foamer Mark is a cartoon depiction of a foam generator dressed as Santa Claus. Obviously, it would only be appropriate during the holiday season.

New Wave used the Mr. Foamer Mark in its 2011 Christmas Card and intended to use it during the following holiday seasons. The fact that New Wave suspended use of the Mr. Foamer Mark in order to alleviate customer confusion due to Appellees' incorporation of "Mr. Foamer, Inc." combined with its confusingly-similar products does not convert New Wave's use of the Mr. Foamer Mark into a *de minimis* or token use.

ARGUMENT

I. THE DISTRICT COURT ERRED IN ACCEPTING THE MAGISTRATE'S FINDING THAT NEW WAVE FAILED TO SHOW USE OF THE "MR. FOAMER" MARK IN COMMERCE IN CONNECTION WITH THE SALE OF ANY GOOD OR SERVICE

In his Report, Judge Turnoff found that New Wave failed to show use of the "Mr. Foamer mark . . . in commerce in connection with the sale of any good or service." (DC DE #77, p. 7). However, the *undisputed* testimony at the October 29, 2013 hearing showed that the 2011 Christmas Card included a

coupon solicitation for New Wave products:

Q: And, there's no offer to sell anything in this [2011 Christmas Card], is there?

A: Yeah. On the inside, actually, there was. We actually did a coupon.

(DC DE #61, p. 80) (emphasis supplied).

Thus, there was no evidence to support the magistrate's finding that New Wave failed to use the Mr. Foamer Mark in commerce in connection with the sale of any good or service. Accordingly, the district court erred in adopting the Magistrate's Report.

II. THE DISTRICT COURT ERRED IN ACCEPTING THE MAGISTRATE'S FINDING THAT NEW WAVE CAN ESTABLISH ONLY *DE MINIMIS* OR TOKEN USE OF THE MARK

Judge Turnoff found that New Wave failed to show a substantial likelihood that it will successfully establish that it owns the Mark because "New Wave can only establish [*de minimis*] or token uses of the Mark during Christmas 2011." However, Judge Turnoff failed to take into account the *seasonal/holiday* nature of the Mark.

New Wave used the Mr. Foamer Mark for the first time in sending its 2011 Christmas Card to "all customers and prospective customers listed in its database." (DC DE #77, p.3). The 2011 Christmas Card includes a cartoon-like depiction of a foam generator called "Mr. Foamer" wearing a Santa hat.

(Exh. 1; DC DE #77, p.7). As Ross testified: “We were planning to send it out again at Christmastime.” (DC DE #61, p. 39). Christmas 2012 never came for the Mr. Foamer cartoon mascot, however, because Appellees’ incorporation of “Mr. Foamer, Inc.” combined with its confusingly-similar products caused New Wave to suspend use of its Mr. Foamer Mark.

However, the fact that New Wave did not use its Mr. Foamer Mark during Christmas 2012 in order to avoid or alleviate confusion to its customers/potential customers clearly would not mean that it “abandoned” its Mark. A mark is deemed abandoned and “free for all to use” where “a mark holder stops using a mark with an intent not to resume its use.” *Cumulus Media, Inc. v. Clear Channel Communications, Inc.*, 304 F.3d 1167, 1173 (11th Cir. 2002); *see also Natural Answers, Inc. v. Smithkline Beecham Corporation*, 529 F.3d 1325, 1329 (11th Cir. 2008) (“intent to resume use of the . . . mark within the reasonably foreseeable future during the short period of alleged nonuse” prevented the mark from being abandoned). Here, the undisputed evidence is that New Wave intended to use its Mr. Foamer Mark in its next Christmas Card.

By the same token, the fact that New Wave suspended use of its Mark after its initial use in 2011 does **not** convert the 2011 use of its Mark into a *de minimis* or a “token” use. Since Christmas comes only once a year, **there was**

no opportunity to use the Christmas-themed Mr. Foamer Mark before New Wave suspended use of the Mark in 2012 to alleviate client confusion.

Although the precise issue appears to be a case of first impression, the Trademark Manual of Examining Procedure³ (“TMEP”) provides insight in section 902.02, titled “Bona Fide Use in the Ordinary Course of Trade.”

TMEP § 902.02 explains that the definition of use in commerce (TMEP § 901.01) was amended by the Trademark Law Revision Act of 1988 (TLRA), Public Law 100-667, 102 Stat. 3935, to add the phrase “the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark.” The primary purpose of the amendment was to eliminate the practice of “token use,” or use made solely to reserve rights in a mark. TMEP § 902.02.

“The legislative history of the TLRA makes it clear that the meaning of ‘use in the ordinary course of trade’ will vary from one industry to another.” TMEP § 902.02.

The report of the House Judiciary Committee stated that:

While use made merely to reserve a right in a mark will not meet this standard, the Committee recognizes that “the ordinary course of trade” varies from industry to industry. Thus, for example, **it might be in the ordinary course of trade for an industry that sells expensive or**

³ The Trademark Manual of Examining Procedure (TMEP) may be downloaded free of charge from the United States Patent and Trademark Office (USPTO) website at: http://www.uspto.gov/trademarks/resources/TMEP_archives.jsp.

seasonal products to make infrequent sales. Similarly, a pharmaceutical company that markets a drug to treat a rare disease will make correspondingly few sales in the ordinary course of its trade; the company's shipment to clinical investigators during the Federal approval process will also be in its ordinary course of trade. . . .

TMEP § 902.02 (citing H.R. Rep. No. 1028, 100th Cong. 2d Sess. 15 (1988))

(emphasis supplied).

The report of the Senate Judiciary Committee stated:

The committee intends that the revised definition of "use in commerce" be interpreted flexibly so as to encompass various genuine, but less traditional, trademark uses, such as those made in test markets, infrequent sales of large or expensive items, or ongoing shipments of a new drug to clinical investigators by a company awaiting FDA approval....

TMEP § 902.02 (citing S. Rep. No. 515, 100th Cong. 2d Sess. 44-45 (1988))

(emphasis supplied). *See also Paramount Pictures Corp. v. White*, 31 USPQ2d 1768, 1774 n.8 (TTAB 1994), *aff'd*, 108 F.3d 1392 (Fed. Cir. 1997) (Table).

Here, New Wave, in its ordinary course of trade, used its Mr. Foamer Mark in a genuine, but less traditional, seasonal or holiday use. Such use was not *de minimis* or a token use.

CONCLUSION

The Order Adopting Magistrate's Report and Recommendation should be reversed and the cause remanded for the court to reconsider Appellant's Motion for Preliminary Junction in view of the validity and priority of New

Wave's Mr. Foamer Mark.

Respectfully submitted,

By: /s/ Donna Greenspan Solomon
DONNA GREENSPAN SOLOMON
Florida Bar No.: 59110
Donna@SolomonAppeals.com
**SOLOMON APPEALS, MEDIATION &
ARBITRATION**
901 South Federal Hwy, Ste. 300
Ft. Lauderdale, FL 33316
Telephone: 561-762-9932

JOHN FARO
Florida Bar No. 527459
johnf75712@aol.com
FARO & ASSOCIATES
1395 Brickell Avenue – Suite 800
Miami, FL 33131
Telephone: 305-761-6921

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,907 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac 2011, Version 14.4.2 in Times New Roman 14 font.

s/ Donna Greenspan Solomon
Donna Greenspan Solomon

Counsel for Appellant,
New Wave Innovations Inc.

Dated: June 12, 2014

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2014, I electronically filed the foregoing with the Clerk of Court using the Electronic Case Files (“ECF”) system, which will send notice of electronic filing to all counsel of record registered for ECF. I further certify that the foregoing will be served on any pro se litigants or attorneys exempt from electronic filing through the conventional means of service set forth in FRAP 25.

s/ Donna Greenspan Solomon
Donna Greenspan Solomon

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 13-22541-Civ-COOKE/TURNOFF

NEW WAVE INNOVATIONS, INC.,

Plaintiff,

vs.

JAMES (JIM) MCCLIMOND, MR. FOAMER,
INC., and CAR WASH EXPERTS, INC.,

Defendants.

**ORDER GRANTING PLAINTIFF'S
UNOPPOSED MOTION TO STAY LITIGATION**

THIS MATTER is before me on the Plaintiff, New Wave Innovations, Inc.'s, Unopposed Motion to Stay Litigation (ECF No. 204). Plaintiff represents that there are a number of related and unresolved matters, central to this matter, that currently are pending before both the Eleventh Circuit Court of Appeals (*New Wave Innovations, Inc. v. James McClimond*, Case No. 14-11466-C) and the Trademark Trial & Appeal Board of the United States Patent & Trademark Office (Opposition to Registration of Mr. Foamer Mark by Mr. Foamer, Inc., Application SN 86/10866). These unresolved matters relate to, and the resolution thereof likely will impact directly, the trademark issues now before this Court.

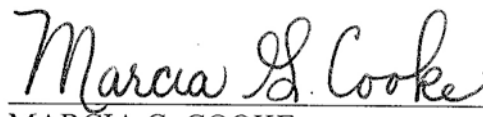
“The inherent discretionary authority of the district court to stay litigation pending the outcome of related proceeding in another forum is not questioned.” *CTI-Container Leasing Corp. v. Uiterwyk Corp.*, 685 F.2d 1284, 1288 (11th Cir. 1982) (citing *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 665 (1978); *Landis v. North American Co.*, 299 U.S. 248, 255 (1936); *P. P. G. Industries Inc. v. Continental Oil Co.*, 478 F.2d 674 (5th Cir. 1973)). “Furthermore, the district court has broad discretion to stay proceeding and can authorize a stay simply as a means of controlling the district court’s docket and of managing cases before the court.” *Danner Const. Co. v. Hillsborough Cnty.*, No. 8:09-CV-650-T-17TBM, 2009 WL 3055315 (M.D. Fla. Sept. 24, 2009) (citing *Clinton v. Jones*, 520 U.S. 681 (1997)).

On September 6, 2013, Plaintiff filed the instant against Defendant Sonesta Coconut Grove, Inc. d/b/a The Sonesta Bayfront Hotel Coconut Grove ("Defendant") in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, alleging violation of the Civil Rights Act of 1866, Title VII of the Civil Rights Act of 1964, and the Florida Civil Rights Act of 1992 for discrimination based upon her national origin. *See generally* Compl, ECF No. 1-2. On December 6, 2013, Defendant removed the action to this Court. *See generally* Notice of Removal, ECF No. 1.

Having reviewed Plaintiff, New Wave Innovations, Inc.'s, Unopposed Motion to Stay Litigation, the record, and the relevant legal authority, it is hereby **ORDERED and ADJUDGED** that Plaintiff, New Wave Innovations, Inc.'s, Unopposed Motion to Stay Litigation (ECF No. 204) is **GRANTED**. This matter is **STAYED** pending the resolution of the related matters before the Eleventh Circuit Court of Appeals and the Trademark Trial & Appeal Board of the United States Patent & Trademark Office.

The Clerk shall *administratively* **CLOSE** this matter. All pending motions, if any, are **DENIED as moot** to be reinstated, if necessary, upon lifting the stay in this matter.

DONE and ORDERED in chambers, at Miami, Florida, this 30th day of September 2014.

A handwritten signature in cursive script, reading "Marcia G. Cooke", written in black ink over a horizontal line.

MARCIA G. COOKE

United States District Judge

Copies furnished to:

Edwin G. Torres, U.S. Magistrate Judge
Counsel of record

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-11466
Non-Argument Calendar

D.C. Docket No. 1:13-cv-22541-MGC

NEW WAVE INNOVATIONS, INC.,

Plaintiff-Appellant,

versus

JAMES MCCLIMOND,
an individual,
MR. FOAMER, INC.,
a Florida corporation,
CAR WASH EXPERTS, INC.,
a Florida corporation,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(January 21, 2015)

Before HULL, MARCUS, and ANDERSON, Circuit Judges.

PER CURIAM:

New Wave Innovations appeals the district court's adoption of the magistrate judge's recommendation of denial of New Wave's motion for Preliminary Injunction. New Wave argues that the court erred when it accepted the magistrate judge's finding that New Wave failed to show use of the "Mr. Foamer" mark in commerce in connection with the sale of any good or service and that New Wave could only establish de minimis or token use of the mark.

New Wave brought suit against the Appellees for trademark infringement, unfair competition/false designation of origin, unfair competition/trade dress infringement, violation of the Florida Deceptive and Unfair Trade Practices Act, and breach of confidential business relationship. It moved for a preliminary injunction, seeking to enjoin Appellees from operating any business using the name Mr. Foamer or using the name in conjunction with its business. New Wave asserts that it used the name Mr. Foamer before Appellees did and that Appellees' use of the name has caused confusion. Specifically, New Wave used the name in a Christmas card that it sent in November 2011; the card depicted a foam generator as a cartoon character and said "Christmas Wishes from Mr. Foamer." Appellees incorporated Mr. Foamer, Inc., in July 2012.

We review the district court's decision to deny a preliminary injunction for abuse of discretion. Forsyth Cnty. v. U.S. Army Corps of Eng'rs, 633 F.3d 1032, 1039 (11th Cir. 2011). We review the court's findings of fact for clear error and its legal conclusions de novo. Id. "This scope of review will lead to reversal only if the district court applies an incorrect legal standard, or applies improper procedures, or relies on clearly erroneous factfinding, or if it reaches a conclusion that is clearly unreasonable or incorrect." Schiavo ex rel. Schindler v. Schiavo, 403 F.3d 1223, 1226 (11th Cir. 2005) (per curiam).

A party seeking a preliminary injunction must establish that "(1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." Siegel v. LePore, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc) (per curiam). "[A] preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the 'burden of persuasion' for each prong of the analysis." Am.'s Health Ins. Plans v. Hudgens, 742 F.3d 1319, 1329 (11th Cir. 2014) (quoting Siegel, 234 F.3d at 1176).

A party who bring an action for trademark infringement must show "that its mark has priority and that the defendant's mark is likely to cause consumer

confusion.” Frehling Enters., Inc. v. Int’l Select Grp., Inc., 192 F.3d 1330, 1335 (11th Cir. 1999). Trademark rights are gained in the common law via actual prior use in commerce. Tally-Ho, Inc. v. Coast Comm. Coll. Dist., 889 F.2d 1018, 1022 (11th Cir. 1990). We have stated that, “[i]n general, uses that are *de minimis* may not establish trademark ownership rights.” Planetary Motion, Inc. v. Techplosion, Inc., 261 F.3d 1188, 1196 (11th Cir. 2001).

The district court did not abuse its discretion. New Wave used the mark a single time, in a Christmas card that purportedly contained a coupon; this coupon and its terms have not been entered into evidence. Thus we do not know how the coupon acted in placing Mr. Foamer in commerce. The card did not infer that New Wave had a new name or was marketing a product with the name Mr. Foamer; it was a cartoon of one of its products in a Santa hat with a greeting attached. As such, it was a *de minimis* use of the mark.¹ Thus, New Wave has not established trademark ownership rights and has not demonstrated substantial likelihood of success on the merits.

AFFIRMED.

¹ We reject New Wave’s reliance on the Trademark Manual of Examining Procedure for its discussion of token use in this context. The discussion in the manual is about seasonal products, not a seasonal ad campaign. New Wave’s Christmas card was not akin to “test markets, infrequent sales of large of expensive items, or ongoing shipments of a new drug to clinical investigators.” TMEP § 902.02 (citing S. Rep. No. 515, 100th Cong. 2d Sess. 44-45 (1988)).